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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 35

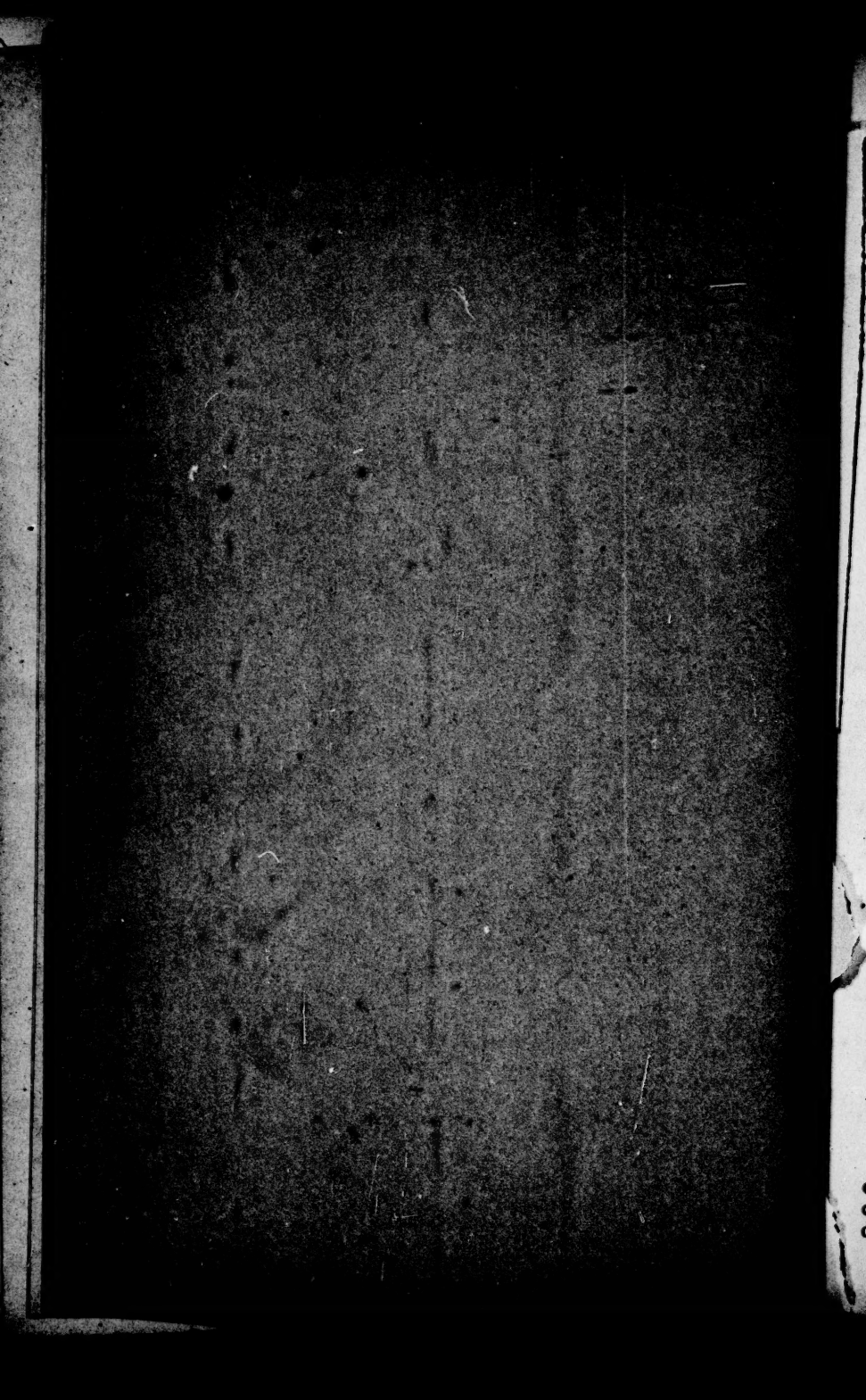
GUSTAV FALK AND ARNOLD FALK, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 1, 1887.



1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Gustav Falk and Arnold Falk and William H. Robertson, a manifest error hath happened, to the great damage of the said Gustav Falk and Arnold Falk, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH,

Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 [Endorsed:] 9431. U. S. Supreme Court. Gustav Falk & ano., pl'ffs in error, *vs.* W. H. Robertson, defendant in error. Writ of error. A. W. Evarts, attorney for pl'ffs in error. Service of a copy of the within writ is hereby admitted this 17 day of September, 1886. Stephen A. Walker, attorney for def't in error. Within writ allowed. Addison Brown, U. S. judge. Sept. 16, '86. [Stamped:] U. S. circuit court. Sep. 17, 1886. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to

seventy-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Gustav Falk and Arnold Falk, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New Yark, in the second circuit, this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH, *Clerk.*

3 Supreme Court, City and County of New York.

GUSTAV FALK and ARNOLD FALK, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.
} Summons. Suit No. 2.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, October 28, 1884.

(S'g'd) A. W. EVARTS,
Plaintiffs' Attorney.

Office and post-office address, No. 52 Wall street, New York city.

4 (Endorsed:) Supreme court, city and county of New York. Gustav Falk and Arnold Falk, plaintiffs, against William H. Robertson, defendant. Suit No. 2. Summons. A. W. Evarts, pl'ffs' att'y, 52 Wall St., N. Y. city.

5 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by Gustav Falk & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 15th day of November, 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

[L. S.]

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 11th day of November, in the year one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

6 (Endorsed:) U. S. circuit court. Gustav Falk & ano. vs. William H. Robertson. Copy. Certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, —— —, 1886. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To —— ——, plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, —— —, 1886. —— ——, plaintiffs' attorney

7 United States Circuit Court, Southern District of New York.

GUSTAV FALK and ARNOLD FALK
against
WILLIAM H. ROBERTSON. } No. 2.

Gustav Falk and Arnold Falk, the plaintiffs in the above-entitled action, by A. W. Evarts, their attorney, complain of William H. Robertson, the defendant therein; and thereupon said plaintiffs state—

First. That the plaintiffs at all the times hereinafter mentioned were copartners in business, doing business in the city of New York under the firm name of G. Falk & Bro., and that the defendant at all such times was collector of customs of the United States at the port of New York.

Second. That heretofore and on the 28th day of October, 1884, an action was commenced in the supreme court of the State of New York in and for the city and county of New York, according

8 to the laws of said State of New York and the rules and practice of said court in such case made and provided, in favor of and in the name of said plaintiffs against the defendant herein upon and for the cause of action hereinafter set forth, and that said defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards and on the 11th day of November, 1884, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said supreme court did thereupon return the said writ and the record and proceedings in the said cause, and did file the same in this court, according to the course and practice of this court.

Third. That said plaintiffs at various times between the 14th day of January, 1884, and the 15th day of April, 1884, imported and entered at the port of New York certain merchandize, consisting of

leaf tobacco, in five lots or invoices, which are described in
9 the bill of particulars required by law to be served herein; which said bill of particulars is hereto annexed, marked Exhibit A, and made a part of this complaint.

Fourth. That the defendant, as collector of the port of New York as aforesaid, exacted from said plaintiffs as and for duty on said merchandise the sum of eight thousand four hundred and eight dollars ($8,408).

Fifth. That by the laws of the United States the true and correct amount of duty payable on said merchandize was five thousand one hundred and thirteen dollars and eighty-five cents ($5,113.85), but that in order to obtain possession of said merchandize so imported by them as aforesaid said plaintiffs were compelled to pay and did pay to said defendant, as collector as aforesaid, the sum of three thousand two hundred and ninety-four dollars and fifteen cents ($3,294) in excess of the amount of duty so as aforesaid lawfully payable on said merchandize.

Sixth. That said plaintiffs filed with said defendant due and
10 timely protests in writing on each entry of such merchandize against his decision exacting such excessive duty, setting forth distinctly and specifically the ground of their objections thereto in manner required by law.

Seventh. That said plaintiffs have duly appealed in each case from the decision of said defendant to the Secretary of the Treasury, who has affirmed such decision as to all the entries aforesaid.

Eighth. That said bill of particulars hereto annexed as aforesaid states separately for each importation and entry of the merchandize aforesaid the names of the importers, the description of the merchandize, the ports from which it was imported, the names of the vessels by which it was imported, the dates of the invoices, the dates of the entries at the custom-house, New York, the precise amounts of duty exacted in excess, the dates of payment of such duties, the day and year on which protests were filed against the exaction thereof, the dates of the appeals thereon to the Secretary of the
11 Treasury, and the dates of the decisions of the Secretary of the Treasury on such appeals.

Ninth. That the sum so exacted in excess for duty as aforesaid has not been repaid to the plaintiffs, although due demand has been made therefor, and is still due and owing to them by the defendant.

Wherefore the plaintiffs demand judgment against the defendant for the sum of three thousand two hundred and ninety-four dollars and fifteen cents, with interest on the several sums, part and parcel thereof, named in the bill of particulars aforesaid from the several dates of payment as appears thereby, together with the costs of this action.

(S'g'd) A. W. EVARTS,
Plaintiffs' Attorney.

12 & 13 United States Circuit Court, Southern District of New York.

GUSTAV FALK and ARNOLD FALK
against
WILLIAM H. ROBERTSON.
} Suit No. 2.

Plaintiffs' Bill of Particulars.

The above-entitled suit has been begun for the recovery of duties erroneously and illegally exacted by the defendant as collector of the port of New York, and the following is a bill of particulars of the plaintiffs' demand in such suit pursuant to § 3012, United States Revised Statutes.

New York, November 29, 1884.

(S'g'd) A. W. EVARTS,
Plaintiff's Attorney.

Name of importer.	Description of merchandise.	Place from where imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house, New York.	Precise amount of duty exacted in excess.	Date of payment of said duties.	Day and year on which protest was filed.	Date of appeal to the Secretary of the Treasury.	Date of Secretary's decision on such appeal.
Gustav Falk and Arnold Falk, composing the firm of G. Falk & Bro.	First invoice, leaf tobacco.	Hamburg ...	Frisia	Dec. 29, 1883	Jan'y 14, 1884	548 95	Sept. 26, 1884	April 24, 1884	April 25, 1884	July 1, 1884
	Second invoice, leaf tobacco.	Amsterdam..	Amsterdam	Dec. 29, 1883	Jan'y 14, 1884	1,344 00	which amount is made up as follows:	April 19, 1884	April 21, 1884	July 1, 1884
						336 00	Aug't 11, 1884			
						336 00	Sept. 10, "			
						134 40	" 26, "			
						537 60	" 30, "			
	Third invoice, leaf tobacco.	Rotterdam...	W. A. Scholten...	Jan'y 3, 1884	Jan'y 22, 1884	298 00	which amount is made up as follows:	Feb'y 8, 1884	Feb'y 9, 1884	May 1, '84, aff. July 1,* 1884
						85 20	Sept. 26, 1884			
						212 80	Oct. 6, "			
	Fourth invoice, leaf tobacco.	Amsterdam..	Zaandam	Jan'y 11, 1884	Jan'y 28, 1884	498 40	which amount is made up as follows:	March 3, 1884	March 4, 1884	July 1, '84 May 1,* 1884
						231 20	Sept. 8, 1884			
						267 20	Oct. 20, "			
	Fifth invoice, leaf tobacco.	Rotterdam...	Maasdam	March 26, 1884	April 15, 1884	604 80	which amount is made up as follows:	July 11, 1884	July 12, 1884	July 21, 1884
						134 40	Sept. 26, 1884			
						403 20	" 27, "			
						67 20	Oct. 8, "			

*Erased in original.

15 (Endorsed over all:) U. S. circuit court, southern district of New York. Gustav Falk and Arnold Falk against William H. Robertson. Complaint and plaintiff's bill of particulars. A. W. Evarts, plaintiffs' attorney, 52 Wall street, N. Y. city. You will please take notice that a complaint, of which the within is a copy, and a bill of particulars, of which the within is a copy, were this day duly filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Yours, &c., A. W. Evarts, pl'ffs' att'y. To Elihu Root, Esq., def't's att'y.

16 Circuit Court of the United States for the Southern District of New York.

GUSTAV FALK & ARNOLD FALK
versus
WILLIAM H. ROBERTSON, Collector, Etc. } 9431.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

17 And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs'

entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

ELIHU ROOT,
United States Attorney, Attorney for the Defendant.

[Endorsed:] 9431. U. S. circuit court, southern district of New York. G. Falk & ano. *vs.* W. H. Robertson, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed —. Timothy Griffith, clerk.

18 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 27th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Nathaniel Shipman, judge.

GUSTAV FALK and ARNOLD FALK
vs.
WILLIAM H. ROBERTSON. } 9431.

Now come the plaintiffs, by A. W. Evarts, their attorney, and move the trial of this cause. Likewise comes the defendant, by William Dorsheimer, U. S. dist. att'y, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, the jury retire, and on their return render a verdict, whereby they find for the defendant.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

19 United States Circuit Court, Southern District of New York.

GUSTAV FALK & Ano.
vs.
WILLIAM H. ROBERTSON. } 9431. Judgment.

SEPT. 7TH, 1886.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury at a circuit court of the October term, 1886, and the issues having been tried and a verdict for the defendant having been duly rendered on the twenty-seventh day of January, 1886, and his costs having been adjusted at $68.85, now, on motion of Stephen A. Walker, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $68.85, his taxed costs, and have execution therefor.

Judgment signed this seventh day of September, 1886.

(S'g'd) TIMOTHY GRIFFITH, *Clerk.*

20 [Endorsed:] 9431. United States circuit court. Gustav Falk & ano. *vs.* Wm. H. Robertson. Judgment roll. Stephen A. Walker, United States attorney, for defendant. Costs, $68.85.

(Endorsed:) U. S. circuit court. Filed Sep. 7, 1886. Timothy Griffith, clerk.

21 United States Circuit Court, Southern District of New York.

GUSTAV FALK and ARNOLD FALK *against* WILLIAM H. ROBERTSON. } Bill of Exceptions.

Afterwards, to wit, on the twenty-seventh day of January, 1886, at a stated term of this court begun and holden on the third Monday of October, 1885, before the honorable Nathaniel Shipman, district judge for the district of Connecticut, duly assigned and appointed to hold this circuit, the aforesaid issues so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly impannelled and sworn for that purpose, the said plaintiffs being represented by Messrs. Joseph H. Choate and Charles C. Beaman and the said defendant by the Hon. William Dorsheimer, United States attorney, and Mr. Henry C. Platt, assistant United States attorney; and in the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings, instructions, charge, and directions of the court and to the refusal of the court to give certain instructions and directions to the jury as then and there prayed for by them, which said
22 exceptions are hereinafter severally set forth.

It was admitted by the defendant's counsel that the plaintiffs duly protested and appealed and brought this suit within the statutory time.

It was stipulated that if the jury found that the plaintiffs were entitled to recover on the questions raised by their protest that a verdict should be entered generally in their favor, subject to adjustment at the custom-house as to formal requisites in the custom-house and as to amount under the direction of the court.

ARNOLD FALK, one of the plaintiffs, being duly sworn and examined, testifies:

I am Arnold Falk, one of the plaintiffs in this suit; the other plaintiff is Mr. Gustav Falk, my brother. We are doing business under the firm name of Falk & Bro., and are importers of tobacco and sellers of native tobacco. We have been in business about twenty years. My firm imported the tobacco referred to in the bill of particulars herein and by the vessels therein specified—that is, the tobacco the duty on which is involved in this suit and as set forth in the bill of complaint. That tobacco was leaf tobacco.

There was not a single bale of that tobacco of which 85 per cent. was of the requisite size and of the necessary fineness of texture to be suitable for wrappers.

23 Q. Was 85 per cent. of the invoice, as a whole, of the requisite size and of the necessary fineness of texture to be suitable for wrappers?

A. No. My firm paid the rates of duties at the times specified in the bill of particulars.

Plaintiffs' counsel read in evidence the entries, invoices, protests, and appeals relating to the several importations referred to in the bill of particulars.

It was stipulated and agreed by the counsel for the defendant that the protest and appeals relating to all the importations involved in this case were all regular and in due form and made, served, and filed when and as required by law, and that there was no irregularity of any kind in the papers or documents on file referring to these several importations; and there was offered in evidence on behalf of the plaintiffs copies of protest and appeal, marked "A" and "B," respectively, it being admitted by defendant's counsel that such protest and appeal were of the same general form as those relating to all the importations involved in this case, and that the entries and invoices relating to the several importations need not be presented to the jury, but be considered as offered in evidence, subject to the right of adjustment under stipulation heretofore made in this case.

"A" and "B" are as follows:

24 "A."

NEW YORK, 171 WATER STREET, *February* 8, 1884.

Hon. William H. Robertson, collector of port of New York.

DEAR SIR: Please take notice that we are dissatisfied with your decision as to the rate and amount of duties to be paid upon eighty-five bales of leaf tobacco imported by us to the port of New York on the 22d day of January, 1884, in the steamer W. A. Scholten, from Rotterdam, and that we hereby protest against such decision, and the following are some of the grounds of our objections thereto:

This importation consisted solely of leaf tobacco, and the duty is fixed by sections 660 and 661 (Morgan's) of Schedule F of the existing tariff law, which sections are as follows:

"660. Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.

"661. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound."

Your liquidation of the duty on our invoice is as follows:

3,154 lbs., at 35c.	$1,103 90
14,487 lbs., at 75c.	10,866 75
	$11,970 65

25 This liquidation shows that you have considered that the greater portion of this invoice was suitable for wrappers, and that it had the other characteristics stated in section 660, and was dutiable thereunder at seventy-five cents per pound, and that you have considered that the balance thereof was not suitable for wrappers and was therefore dutiable under section 661 at thirty-five cents per pound.

Your liquidation does not show the manner in which you made your separation of our leaf tobacco, but it would seem as if you had not considered the invoice as a unit nor even the bale as a unit, but that you had in some arbitrary way separated the leaf tobacco into two portions and applied one rate of duty to one portion and another rate of duty to another portion without any reference to the proportion which these two portions bore to each other.

The sections quoted from the tariff clearly mean that leaf tobacco is to be dutiable at thirty-five cents per pound unless eighty-five per cent. of it is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound.

Now, your liquidation of our tobacco shows on its face that in your opinion, taken as a whole, eighty-five per cent. thereof is not of the requisite size, &c., to be suitable for wrappers, &c.;
26 otherwise you would have found the whole of it dutiable at seventy-five cents per pound. We also know as a fact, as you probably do, that in the above invoices there is not a single bale eighty-five per cent. of which is of the requisite size, &c., to be suitable for wrappers. You cannot, then, have considered either the whole invoice or the single bale as the unit with reference to which the percentage of eighty-five per cent. is to be determined, but you have seen fit to determine the percentage with reference to some other unit.

We know that neither eighty-five per cent. of the whole invoice nor eighty-five per cent. of any bale thereof is leaf tobacco possessing the characteristics stated in section 660, and under such a state of facts we claim that none of our leaf tobacco in this invoice is dutiable at seventy-five cents per pound, but that it is only dutiable at thirty-five cents per pound. You made the total duty on the leaf tobacco in this invoice to be $11,970.65. We claim that it should not be more than $6,175.05, and we protest against the liquidation or the payment of duties thereon at any larger sum than $6,175.05.

Yours faithfully, G. FALK & BROTHER.

"B."

Appeal.

27 171 WATER ST., NEW YORK, *February 9th*, 1884.

Hon. C. J. Folger, Secretary of the Treasury.

DEAR SIR: We hereby appeal from the decision of the collector of customs in assessing duty at the rate of thirty-five cents per pound

on one portion and at the rate of seventy-five cents per pound on another portion of certain leaf tobacco contained in eighty-five bales, imported by us per steamer W. A. Scholten, from Rotterdam, on the 22d of January, 1884, and we claim that the whole of said leaf tobacco should pay duty only at the rate of thirty-five cents per pound, for the reasons, among others, as set forth in our protest of the 8th instant, duly filed on that day with the collector of customs of New York for transmission to you.

The leaf tobacco in these bales was bought and imported by us in full reliance upon the correctness of your decision as announced in your letter of the 10th of November, 1883, to the collector of New York, such last letter having been written by you after a full statement by letter from us to you of our purposes in the matter, and after a report from the appraiser of this port with reference thereto.

Yours truly, G. FALK & BRO.

28 Being cross-examined by defendant's counsel the witness testified as follows:

Q. How many commercial sorts of tobacco did these bales severally contain?

A. There were two kinds, one suitable for wrappers, the other not; the commercial names for those two kinds were wrappers and fillers. Those were names well recognized in the trade prior to the 3rd day of March, 1883, as being the names of distinct grades of leaf tobacco applicable to different uses, wrapper tobacco being applied to the making of wrappers for cigars and filler tobacco being used for filling purposes.

Q. Is wrapper tobacco, as it is known in the trade, all of it fit for wrappers?

A. Yes; it ought to be.

Q. Is the whole quantity of wrapper tobacco, each leaf of it, fit for wrappers?

A. For what we know it is all fit for wrappers; as far as the dealer or packer knows it is all fit for wrappers.

Q. When there is a quantity of wrapper tobacco, baled wrapper tobacco, is every leaf of the bale fit to be used for wrappers?

A. Very often the case is it is not.

Q. So that in a given quantity of wrapper tobacco it is not all fit for wrappers?

A. No; that is very often the case.

Q. And that was so at and prior to the date of this act?

A. Generally.

Q. There were other grades of leaf tobacco that were known
29 in the trade at and prior to the date of this act?

A. Yes, sir.

Q. Such as what?

A. Fillers and binders.

Q. Binders being used for what?

A. Well, for filler purposes and for kind of secondary wrapper.

Q. An inner wrapper?

A. An inner wrapper; yes.

Q. And distinguished from the wrapper by a different name?
A. That is all.
Q. And being less valuable?
A. Once in awhile.
Q. The various grades of leaf tobacco, the binders and fillers and wrappers, are and were at and prior to the date of this act applied to different uses, and were bought and sold under different names and were of different value in the market; is that so?
A. It is.
Q. I suppose those various grades were also further subdivided in their use according as they were stemmed or unstemmed?
A. Very seldom. I never saw any stemmed.
Q. You never saw any bales of leaf tobacco stemmed?
A. In the trade here I never saw any leaf of stemmed tobacco sold.
Q. Of any kind in this country?
A. No.
Q. Are bales of leaf tobacco and were they at and prior to the date of this act divided on any other principle, as by some name indicating the soil on which it was grown?
A. No, sir.
Q. Is there a tobacco known as Havana leaf or Sumatra leaf?
30 A. Yes; there is some known as the Sumatra leaf.
Q. And Havana tobacco?
A. Yes, sir.
Q. And Connecticut tobacco?
A. Yes.
Q. Maryland?
A. Yes; according to the State where it is grown.
Q. These are all distinct articles in the trade?
A. Yes, sir.
Q. And they are all leaf tobacco and all different classes of leaf tobacco?
A. Yes, sir.
Q. Those classes are perfect- *fully* well known and distinguished one from the other?
A. Yes, sir.
Q. They were divided into classes by reason of the use and by reason of the different places where the tobacco was grown? They were divided in both of those ways in the trade, were they?
A. Yes, sir.
Q. How, at the date of the passage of this act, in the trade of this country, was leaf tobacco customarily bought and sold?
A. By examining the goods. This class of goods was sold by examining the goods.
Q. Examining how much of the goods?
A. Well, a bale.
Q. How much of a bale?
A. Well, the entire bale was tested by an inspector.
Q. You would examine that bale if you were buying it?
A. Yes, sir.

Q. How would you examine it?

A. Open the bale and look at the tobacco. Either Havana or Sumatra tobacco or Java tobacco would come in bales, but American tobacco was sold in a different style, in different ways.

31 Q. That is, leaf tobacco of different classses according to its origin was sold at different ways?

A. No; American tobacco, grown in America, was sold on a different style from the Sumatra tobacco.

Q. What was that?

A. From each package a sample was drawn by an inspector, and the tobacco was sold by the sample, and it was guaranteed by the sample.

Q. What was the sample—a hand of tobacco?

A. Yes; a hand was a sample.

Q. What do you mean by a "hand?"

(Showing witness sample of tobacco.)

A. Yes; that is a hand.

Q. A number of leaves put together is called a hand?

A. Yes, sir.

Q. You say American tobacco was bought and sold by sample hands?

A. Yes; by samples; by drawn samples by an inspector; what we call a drawn sample, by an appointed inspector. For instance, he takes a package of tobacco and opens the entire package and takes out of six or eight different parts of that package a hand.

Q. The inspector takes out six or eight different hands?

A. He goes in and opens six or eight different parts of the package and draws out a hand from each part and puts them together; that constitutes a sample of that tobacco; and he guarantees that tobacco is like that sample. That is the way it is done in the trade.

Q. You say that isn't true with the foreign tobacco?

A. No, sir.

32 Q. How is that sold?

A. Generally sold by inspection because most all of his tobacco is lying in a bonded warehouse. When a man wants to buy a lot of tobacco we never say it is a sale except he examines the bales or packages, and he can open as many as he wants to. He can open all, or he can open only one; then after he examines it that is a sale.

Q. He sees the whole lot that he is going to buy and examines as much of it as he pleases?

A. Yes, sir.

Q. That is customary with Sumatra tobacco?

A. Sumatra and foreign tobacco. Havana tobacco, Sumatra tobacco, and Java tobacco, and any kind of goods here in port.

Q. Java tobacco?

A. Yes; any tobacco that comes into port.

By the court:

Q. These inspectors are appointed under the State law?

A. Yes, sir.

Q. And not by the collector?
A. Not by the collector.

By defendant's counsel:

Q. I understand that leaf tobacco at the date of the act was generally bought and sold at so much per pound by the bale?
A. Yes.
Q. A customer would buy a certain number of bales and pay for it at so much per pound?
A. Yes, sir.
Q. That was true of all sorts of leaf tobacco at the date of the act?
A. Yes, sir.

33 Q. In leaf tobacco of these various sorts that you have described as ordinarily baled and packed at or prior to March, 1883, was it usual that leaf tobacco or two or more of the different sorts, say wrappers and fillers and binders, would be put into one bale?

Mr. CHOATE: I object to that as irrelevant and immaterial.

Objection overruled; plaintiffs except.

Answer. Yes, sir.
Q. You say that was usual in a given bale, as to binders and wrappers and fillers?
A. Yes; once in awhile; general use, no.
Q. Generally not?
A. Generally not.
Q. Generally bales of leaf tobacco which, at the date of this act were bought and sold in the trade in this country, were exclusively of one of these sorts?
A. Most of the time.
Q. That is, a bale of leaf tobacco would be expected to consist, at and prior to the date of the act, of wrappers or of fillers, would it?
A. Yes, sir.
Q. Not one bale to contain part wrappers and part fillers?
A. Yes; you can pick out—you can pick out in bales what they call fillers. You can pick out wrappers to be used for wrapper purposes.
Q. And still it is wrapper tobacco in the bundle?
A. Yes.
Q. Just as any wrapper tobacco, you can pick out wrappers that are only fit for fillers sometimes?

34 A. That is, once in awhile.

Q. Was it customary, as bales of leaf tobacco were baled at and prior to March, 1883, to have, say, Sumatra and Havana tobacco in the same bale?
A. No, sir.
Q. Or Sumatra and Java tobacco in the same bale?
A. I couldn't say yes or no to that question.
Q. You say leaf tobacco was divided according to the country of its origin, and was called Havana, Brazil, or Sumatra tobacco?
A. Yes, sir.

Q. Was it usual to have the leaf tobacco in the bales all of one kind, according to the country of its origin?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Now, with reference to these particular importations, I understand you to say that each bale contained some tobacco of the class known in trade as wrapper tobacco, and some of the class known as filler tobacco?

A. Yes, sir.

Q. Look at the samples I show you; do they illustrate the two sorts of leaf tobacco as there were in these bales in this suit?

A. Yes, about.

Q. The smaller being the filler?

A. Yes; the smaller. Those (the other) are for wrappers.

Q. Now, with reference to these particular importations of yours, tell me how the wrappers and fillers were packed together and how they came to be packed together?

35 A. Well, we put the original wrappers. We put this filler tobacco not suitable for wrappers. We put on top of this wrapper tobacco, which made an original bale.

Q. Do I understand you that the wrapper tobacco in these bales was Sumatra tobacco?

A. Yes, sir.

Q. And a bale of the Sumatra tobacco weighed about how much?

A. About 160 to 170 pounds.

Q. Then I understand that these bales that were imported you took that bale and put some filler tobacco on top of it?

A. Put some filler tobacco, but we had to make it more than 15 per cent.

Q. I want to know what you did first before you give the reason. You put some filler tobacco on top of it?

A. Yes, sir.

Q. And you separated it from the Sumatra tobacco?

A. Put it on the Sumatra tobacco.

Q. Did you separate it by anything?

A. There may be strips of paper between them.

Q. You put strips of paper between the wrapper tobacco and the filler tobacco?

A. Between the wrapper tobacco and the filler tobacco.

Q. You took a whole bale of Sumatra tobacco and then you put some paper on it, and then put on top of that some filler tobacco—enough to be more than 15 per cent. of the whole quantity of both sorts?

36 A. Yes sir.

Q. For practical purposes, was there any difficulty in separating the filler from the wrapper after you got the package here?

A. No; it wasn't much difficulty; no, sir.

Q. The difficulty would be the mere labor of moving it, not of distinguishing the kinds of tobacco, or the kinds of tobacco one from another?

A. No; not at all.

Q. There would be no difficulty at all in doing that?

A. No, sir.

Q. As to any of these bales, did you, after receiving them from the custom-house, take off the filler tobacco and put it by itself and sell it by itself, and take the original bale of Sumatra tobacco by itself and sell it by itself?

A. Once and awhile we did; oh, yes.

Q. You did. There was no difficulty in doing that?

A. No, sir.

Q. What do you mean by once in awhile?

A. We sell it complete; sell the entire package as it originally came in port, a good deal of it.

Q. Have you parted with all of it?

A. We sold all; yes.

Q. And some of it you say — sold just as you received it from the custom-house?

37 A. Yes; sold it in bond, and some of it out of bond.

Q. You sold part of it while it was in the bonded warehouse?

A. Yes, sir.

Q. I mean such part as you yourself took out?

A. Very often we separated it; yes, sir.

Q. You divided it up into quantities of filler and an original package of Sumatra tobacco, and then sold that package of Sumatra tobacco?

A. Yes, sir.

Redirect by plaintiff's counsel:

Q. You have spoken about these different classes of leaf tobacco, wrappers, and fillers and binders. Those are simply divisions that are made according to the sort and quantity, are they not?

A. Yes, sir.

Q. And they are made into rough hands, I suppose, by the planters?

A. By the farmers who sell the tobacco—who sort the tobacco.

Q. They are made by the farmers, who sort them as they would potatoes—in a general way?

A. Yes, sir.

Q. Those that are fit for wrappers are sold generally together, and those for fillers and those for binders?

A. No; they sell them at a pound price.

Q. So much a pound?

A. So much a pound of the entire stuff—what they have got.

38 Q. So that the farmer, when he sells them, sells at so much per pound, and it is afterwards separated by the merchants?

A. Separated by the merchants.

Q. By this separation they ascertain what parts would be suitable for the different packages?

A. Yes, sir.

Q. You have been asked whether, in the wrapper tobacco, it was

all suitable for wrappers. As I understand it, it is all considered suitable for wrappers by men who take it?

A. Yes, sir.

Q. You say that some of it may turn out to be not suitable for wrappers. How can that be determined?

A. The only one who can determine that is the man who uses the wrapper tobacco and make- cigars—the man who works up the tobacco.

Q. What has he got to do with that tobacco before he can tell?

A. He has to wet it to get it in such condition that he can apply it—to cut it and use it for wrapper purposes on the cigars.

Q. And then in working and making cigars and unfolding any of the leaves which are not wet he may find some that is not fit for wrappers?

A. Yes, sir.

Q. That he can only find out by actually handling the wrapper?

39 A. Yes, sir.

Q. That is the only way you would be able to tell which is ultimately clear wrapper tobacco?

A. Yes.

Q. You have spoken about the method in which you repack these bales, as it were. You didn't import these bales or pack them, did you, until after you had received the communications from the Secretary of the Treasury, one under date of May 18th, 1883, and one of date February 10th, 1883?

A. No, sir; we had these cases inquired into at the Department, and they told us they couldn't tell us anything definite about it. We should only make the actual importation to be such classes of tobacco, and they would decide on it.

Q. Then you imported ten bales?

A. Then we imported ten bales.

Q. Those ten bales were packed just as you have described?

A. Yes, sir.

Q. Just as advised?

A. Yes, sir; the bale alone.

Q. You had that test case, and then after that was decided in your favor you went ahead and made the large entries?

A. Yes, sir.

Q. And Sumatra tobacco, as I understand it, comes from the Island of Sumatra and is for sale in Holland?

A. Yes, sir.

40 Q. And that is where the merchants buy it?

A. Yes, sir.

Q. And the bales which you imported were bales as they came from Sumatra, except that while they were in Holland you there opened each bale, and in that bale you put more than 15 per cent. of the dutiable amount in fillers?

A. Yes, sir.

Q. And then you tied up the bale again?

A. Yes, sir.

Q. So that the outside bale as it came here was just as it originally came from Sumatra, but you had altered the contents of it by adding this?

A. Yes, sir.

Q. You altered it in the same way as you did with the ten bales?

A. Yes, sir.

Q. You have spoken of a little slip of paper between the two kinds of tobacco. That was put in, as I understand you, by suggestion of the collector's office here, so that you could easily distinguish whether there was 85 per cent. of wrappers, so that you could pay that duty and have no trouble?

A. Yes, sir.

Plaintiffs' counsel then read in evidence certain correspondence between Messrs. Falk Bros. and the Secretary of the
41 Treasury and between Messrs. Falk Bros. and the collector as follows:

NEW YORK, *July 9th*, '83.

Hon. Chas. J. Folger, Secretary of the Treasury, Washington, D. C.

DEAR SIR: We are the most extensive importers of Sumatra leaf tobacco from Holland, on which duties have been increased under Schedule F in new tariff bill, per annexed slip, this being the only leaf tobacco which is affected by the stipulation of "85% wrappers and more than 100 leaves to the pound."

Information has reached us to the effect that parties are offering these tobaccos in this market—to arrive—with the understanding that a certain quantity of short tobacco unfit for wrappers shall be packed in each bale to lower the percentage of wrappers and enable the entire bale to come in under the 35-cents rate, or in an invoice of, say, 25 bales 20 bales will be choice wrappers and 5 bales common fillers, thus bringing the average down to the lower rate of duty.

We would respectfully ask you to favor us with your ruling on the legality of this action, as, if allowable, we shall be compelled to adopt the same tactics in order to protect our business in
42 the competition which will necessarily arise if this mode of evading the higher rate of duty is followed by others.

Awaiting your early reply, we are,

Yours very resp'f'y, G. FALK & BRO.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *July* 13, 1883.

Messrs. G. Falk & Bro., New York:

GENTLEMEN: For reply to your letter of the 9th instant you are referred to the accompanying copy of decision No. 5715, which interprets the provision of law you cite relating to Sumatra tobacco as applying to each bale and not to each invoice.

Very respectfully, H. S. FRENCH,
Acting Secretary.

NEW YORK, *July 16th*, '83.

Hon. Wm. H. Robertson, collector of customs, New York.

DEAR SIR: Referring to Department decision No. 5715,
43 relating to the limitation of 85% wrappers in each bale tobacco necessary to the higher rate of duty under new tariff bill, taking effect July 1st instant, would state that Sumatra tobacco, wholly wrappers, has been offered in this market, to arrive from ports in Holland, in each bale of which it is proposed to pack sufficient small tobacco (fillers) to reduce the average of wrappers below the 85% limitation, and thus allow the entire bale to come in under the 35c. rate instead of 75c., as intended by this 85% limitation.

Please kindly favor us with your ruling on the legality of this action, as, being the most extensive importers in the past of this class of tobacco, we must protect our interest against undue competition by being prepared to adopt such measures as others in our trade are allowed to use.

Awaiting your speedy reply, we are,
Yours very resp'tf'y, G. FALK & BRO.

CUSTOM-HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *July* 19, 1883.

SIRS: I have to acknowledge the receipt of your letter of the 16th instant, the contents of which have been duly noted.

It is the practice of this office to decide questions as to the
44 rate of duty upon merchandise when an actual importation is made, and it cannot undertake to answer hypothetical questions.

The matter of importations of the character referred to is under consideration, however, and when definite action has been taken you will be informed upon calling at this office.

Very respectfully, GEO. W. PALMER,
Deputy Collector.

To G. Falk & Bro., 171 Water St., New York.

NEW YORK, *25th October*, '83.

Hon. Chas. J. Folger, Secretary of the Treasury, Washington, D. C.

DEAR SIR: We would respectfully call your very particular personal attention to a certain recent importation of leaf tobacco in bales from the port of Amsterdam, Holland, to this port, particulars of which we give below, and upon which the appraiser of this port has made a ruling to which we strongly and emphatically object as being contrary to the existing law governing such importations.

On the 22d Sept. ult'o we received from our house in Amsterdam a lot of 10 bales Sumatra tobacco, weighing ab't 987
45 kilo-, nett, equal to ab't 2,173 lbs., American weights, and of which we hand you herewith detailed memoranda.

This tobacco was packed and imported expressly for the purpose of testing that portion of the new tariff, Schedule F, paragraphs 660 and 661, taking effect on the 1st of July last, reading as follows:

"Leaf tobacco of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound;" and "all other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound;" and also with reference to decision of your Department No. 5715, dated May 18, 1883, "that the limitation of 85 per cent." refers to "each package and not to each invoice," which decision was mailed us with your letter of July 13, 1883, and in accordance with which decision and the above letter we have made this venture.

This importation of 10 bales leaf tobacco contained, according to the returns of the appraiser of this port, 1,660 pounds suitable for wrappers, and upon which he levies a duty of 75 cents per pound, and 440 pounds unfit for wrappers, upon which he levies a duty of 35 cents per pound.

46 This division of the contents of the lot into two distinct grades at different rates of duty is in direct contradiction to the referred-to section of the new tariff, less than 85 per cent. of the total pounds being suitable for wrappers, and consequently should have been passed as an entirety at the 35-cent rate of duty.

Again, the appraiser's return should have made detailed account of each particular package according to Department decision No. 5715, above mentioned, which would also have resulted in the passing of each and every bale at the 35-cent rate according to law.

We would now respectfully ask you to give this matter your immediate and thorough consideration and make such necessary ruling as will place these sections of the new tariff beyond the possibility of question.

We confess that this law was undoubtedly framed for the purpose of prohibiting the importation of Sumatra tobacco, which has been a very important feature in our trade with Holland for the past three years, as this tobacco is the only leaf which can possibly come under the restrictions the first referred-to section of the new tariff imposes—if packed in the manner customary previous to the taking effect of said new tariff.

47 We have, consequently, taken advantage of the exact reading of the law as it stands on record, and have caused our tobacco to be originally packed to contain less than the limitation of 85 per cent. of wrappers in each package, and claim our distinct right to import at any and at all times during the existence of the present tariff such quantities of this tobacco as we may desire.

We have been by far the most extensive importers of this tobacco, and have paid duties on this leaf since the 1st January last to exceed $250,000.

Our trade in these goods is a very important one, as you will readily perceive by above figures, and we desire to continue same if it can be done in conformity with the laws of the United States, of which we are peaceful and law-abiding citizens.

Hence, while there remains the least doubt in the minds of any of your subordinates as to the proper rendering of the law relating to

these importations, we consider it your duty to fully instruct them without delay as to the correct reading of same so as not to impede the regular course of a very important trade.

Trusting you will take immediate action in this matter, we are, sir,

Yours very respectfully, G. FALK & BRO.

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TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 31, 1883.

Messrs. G. Falk & Bro., New York.

GENTLEMEN: I am directed by the Secretary to acknowledge the receipt of your letter of the 25th instant in regard to the action stated to have been taken by the customs officers at New York in the classification for duty of certain Sumatra tobacco.

The law requires the Secretary of the Treasury to render a decision as to the rate or amount of duty on imported merchandise only on protest and appeal presented by the importer under section 2931, Revised Statutes, and no decision on the case can be made until such protest and appeal shall have been made.

Your letter, however, has been forwarded to the collector, with instructions to take the statements you make into consideration upon the receipt of the appeal and to forward all the papers with a report of his views to the Department.

Very respectfully, H. F. FRENCH,
Assistant Secretary.

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TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *November* 10, 1883.

Messrs. G. Falk & Bro., New York.

GENTLEMEN: The Department is in receipt of your letter of the 25th ultimo relative to the classification of certain leaf tobacco imported by you.

In reply, you are informed that the Department has disposed of the case by instructions this day addressed to the collector of customs at New York, to whom you are referred for particulars.

Respectfully, H. F. FRENCH,
Acting Secretary.

By defendant's counsel:

Q. As Sumatra tobacco was generally imported it was in such bales only as were opened and something added to them in these cases?

A. Before this time?

Q. Yes.

A. No, sir; I don't know of any case.

Q. You may state what you mean.

A. You asked me if, prior to this act of 1883, there was any to-

bacco imported here of Sumatra tobacco opened on the other
50 side, in Holland, if they would put in other tobacco in the same bales. I don't think that they did.

Q. They did not?

A. I don't think that they did.

Q. The bale of Sumatra tobacco that was dealt in and known prior to this act was a bale containing about 160 or 170 pounds of Sumatra tobacco?

Same objection; objection overruled; plaintiffs except.

Answer. It is the same.

Q. And the difference between that and the article that you imported in this case was that to that tobacco you added some filler in Holland?

A. Yes, sir.

To further maintain the issues on the part of the said plaintiffs GEORGE C. HAMLIN was produced, sworn, and examined and testified as follows:

My official position in the appraiser's office at the port of New York is examiner of cigars and tobacco. I have been such examiner going on eight years now, especially in the class of tobacco. I have examined and know about these importations made by Falk Brothers. In those importations there was no one bale in which there was *no one bale in which there was* 85 per cent. of the whole
51 contents suitable for wrappers.

In determining and examining those bales or in examining any bales of tobacco as to what is suitable for wrappers I only pass upon it in a general way. I don't examine each particular leaf and wet it and test it to determine whether each leaf is suitable for weappers.

Q. How do you distinguish leaf tobacco for wrappers from leaf tobacco not suitable for wrappers?

A. By the separation of the bale; by the small slip of paper in the bale which separates tobacco for the purposes of arriving at the percentage easily.

Q. That is the way it is separated in the package?

A. Yes, sir.

Q. So that you can tell more easily?

A. Yes, sir.

Q. Instead of having this tobacco?

A. It would be almost impossible to determine without separation in that way.

Q. It is done in order to facilitate the classification?

A. It would be almost impossible to determine it without it.

Q. It would be almost impossible to determine unless the tobacco was separated?

A. It would be practically impossible.

Q. Would it not, in your opinion, be possible to determine the character of that tobacco by a given percentage in each hand?

52 A. That would be also practically impossible. It would require more separation and would require more force than we have got to do it; besides it destroys the package.

Q. It would necessitate the tearing of each particular package to pieces?

A. Yes, sir.

Q. And examining each leaf in each hand?

A. Yes, sir.

Q. What are the general differences in quality of tobacco in one of these packages that is suitable for wrappers and the quality of tobacco in that package which is not suitable for wrappers?

A. One is sufficiently fine in texture for wrapper purposes, finer leaf, and the other is a coarser, heavier leaf.

Q. They are all tobacco grown on the same stock?

A. Yes, sir.

Q. And the only difference is in the quality of the leaf?

A. In the quality of the leaf.

Q. And the size of the leaf?

A. The size of the leaf; some are larger and some are smaller.

Q. And therefore a leaf that is large isn't necessarily fit for wrapping?

A. A large leaf is not suitable that is not of that fineness.

Q. Then there is a difference in fineness?

A. Yes, sir.

53 Q. You say substantially this: That the only practical way in which you as the appraising officer can distinguish is to take the different percentages kept apart by these strips of paper?

A. Exactly so, sir.

Q. And these that were imported by Falk were kept apart by slips of paper, as suggested by the Government?

A. Exactly.

Q. These slips of paper were just little, narrow strips which were put in under the whole width of the package, and you could weigh and see that not more than 15 per cent. was suitable for wrappers, and that was so in each of these cases?

A. Yes, sir.

Q. Now, after this Falk tobacco, which you say went through, and the decision of the Secretary of the Treasury and the Attorney General's opinion since then, none of this tobacco has come in that has been packed as Falk Brothers packed theirs, has there?

A. Yes, sir.

Q. With part fillers and part wrappers?

A. No, sir.

Q. Now, what change has taken place?

A. The change has been in passing the bale of wrappers.

Q. Is there a separation just as before?

A. Yes, sir.

Q. And the strips of paper are in as before?

A. Yes, sir.

Q. There are strips of paper and two kinds of tobacco in the bale?

54 A. Well, they are all wrappers.

Q. Two kinds of wrappers?

A. Yes, sir.

Q. What is the difference in the two kinds of tobacco?

A. One, as I have stated, is fine texture of leaf and the other, of course, heavy leaf, one being sufficient fineness that more than 100 leaves would weigh a pound and the other coarser, requiring less than a hundred leaves to weigh a pound.

Q. They are all packed so that about how much per cent. of them require one hundred leaves?

A. Eighty.

Q. And the rest is tobacco suitable for wrappers or all wrapper tobacco, but it is of that quantity [quality] that less than one hundred leaves are required to weigh a pound?

A. Exactly so.

Q. At what rate is that coming in?

A. Thirty-five cents.

Q. Is not substantially all wrapper tobacco coming into the port of New York now and been coming in for a year or more at thirty-five cents?

A. Packed in that form.

Q. And it is from Sumatra and everywhere else?

A. Yes, sir.

Q. And, as a matter of fact, you know at the appraiser's office that this tobacco, packed in this way, is all from Sumatra?

55 A. Yes, sir.

Q. And none of it paying but thirty-five cents?

A. No.

Q. Don't you know as a matter of fact that leaf tobacco of which more than one hundred leaves are required to weigh a pound, Sumatra tobacco, is tobacco that is more valuable per pound than tobacco of which less than one hundred leaves are required to weigh a pound?

A. They can utilize it to make more cigars.

Q. And isn't it more valuable per pound, as you understand it?

A. No, sir; I don't think it is. The short leaf appears to be more frequently sought for.

Q. It is poorer tobacco; it is inferior, but it is all good?

A. Yes, sir.

Q. Just as suitable for wrappers as the other?

A. Yes, sir; just as suitable.

Q. The only difference is that it isn't of that weight of which one hundred leaves are required to weigh a pound?

A. It isn't of that weight and that fineness of texture.

Q. This paper is put in just the same?

A. Yes, sir; exactly the same.

Q. In determining what might be considered a possible unit for the importation of tobacco of which 85 per cent. was to be calculated, do you know of any other unit than the invoice?

56 Defendant's counsel objects. Objection sustained.

Plaintiffs' counsel duly excepts.

Q. Taking it from the time the stamp of the receipt at the custom-house is put on, that being a blue stamp, isn't it?

A. April 16th, 1884.

Q. That is the date it was received at the custom-house?

A. Yes, sir.

Q. Now, will you give us in order the subsequent entries that appear on this invoice; that is, showing the steps at the custom-house?

A. That is the entry number of the steamer stamped on it.

Q. Read it.

A. 15th of April, 1884; entered that date. The blue number you see, 31162, is the entry number on the invoice. The 9009 is the invoice number; that is the calculation on the whole invoice. "Leaf tobacco not stemmed, wrapper, 75 cents."

Q. Who put that on?

A. I did, sir.

Q. Applying to the whole?

A. Applying to the whole; yes, sir.

Q. That is the first entry you made?

A. Yes, sir. Wrappers, seventy-five; fillers, thirty-five; that was an earlier calculation.

Q. Well, what was next?

A. The next was an examination of seven bales; the receipt here on this next is "Wrapper, paragraph 660, Morgan; not
57 wrapper, 248, paragraph 661, Morgan"—660 Morgan paying seventy-five and 661 Morgan thirty-five.

Q. Then there was a still further re-examination, some bales ordered in to be re-examined, being the portion of the bales included in the invoice?

A. Yes, sir.

Q. I want to ask you this question: You classified a certain number of pounds as the final result, did you not?

A. Yes, sir.

Q. As dutiable at seventy-five cents?

A. Yes, sir.

Q. And a certain other number of pounds, but a smaller number, as dutiable at thirty-five cents?

A. Yes, sir.

Q. And that was all the judgment you expressed upon the matter of the appraisement?

A. That is all, sir.

Q. So far as it appears on the invoice?

A. Yes, sir; that is all.

Q. Now, isn't it true that all of that which you classified as subject to seventy-five cents you found to be leaf tobacco of the requisite size and the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves were required to weigh a pound?

A. Yes, sir; but that was at a time when we were not as thoroughly familiar with the law as we are at the present time.

58 Q. I am merely asking you now to see what you found.
A. I was in doubt myself at the time.
Q. I am now asking you whether all of that which you classified as charg-able with seventy-five cents duty you found to be of the requisite size and necessary fineness of texture to be suitable for wrappers?
A. Exactly, sir.
Q. And the way you came to the conclusion that it was subject to seventy-five cents duty was that part of it was; that inasmuch as it was all of that quality to be suitable for wrappers, of course eighty-five per cent. of it was, and therefore you charged it with seventy-five cents?
A. Exactly so.
Q. And you didn't find or determine that any part of that which you classified as charg-able with seventy-five cents duty was unsuitable for wrappers?
A. No, sir.
Q. And so, as I understand it, that is the fact in regard to the appraisement of all of this that is in dispute here?
A. Yes, sir; I considered that there was fully eighty-five per cent. of the quantity that was suitable for wrappers.
Q. That is, you considered all that you classed at seventy-five cents was, within the description of this section of the law, suitable for wrappers?
A. Exactly, sir.
59 Q. And if all was then, of course, eighty-five per cent. was?
A. Yes, sir.
Q. Before this lot was passed and the first importation of ten bales was made by Falk Brothers tobacco always came in in bales?
A. Yes, sir.
Q. And that is true now, isn't it, that it always has from the beginning, as far as your knowledge goes down to the present time, come in in bales?
A. Yes, sir.
Q. It has been entered by the bale?
A. Yes, sir.
Q. Described in the invoice by the bale?
A. Yes, sir.
Q. And received and disposed of under the Treasury regulations by the bale as to appraisal and as to warehousing and as to withdrawal?
A. Yes, sir.
Q. And have you ever known any instance before the attempt had been made in this case in respect to an invoice or importation to appraise it for duty except by the bale?
A. No, sir; only by the bale.
Q. As a unit, by the bale?
A. Yes, sir.
Q. And in respect to any other class of merchandise that comes in in packages or bales have you ever known of any attempt on

the part of the Government to fix the rate of duty or appraise
60 it except by and upon the bale, bale per bale?

A. That is the only way, yes, sir; bale by bale.

Q. All of this tobacco involved in this suit was leaf tobacco of course?

A. Yes, sir.

Cross-examined by counsel for the defendant:

Q. What rate of duty per bale did you impose?

A. Thirty-five cents per yound.

Q. You imposed thirty-five cents per pound?

A. Yes, sir.

Q. Then you don't admit the commodity per bale, but by the pound, do you not?

A. Pounds contained in that bale.

Q. You merely describe the package in which the pounds are usually determined, is that it; the bale is the package in which the pounds of tobacco generally come?

A. Yes, sir.

Q. That is what you meant, then, in your replies to the learned counsel?

A. A bale or package containing so many pounds.

Q. The duty is levied per pound. The bale weighed and its contents are written in pounds and the duty levied upon the pound?

A. Yes, sir.

Q. Now, I ask your attention this particular importation. Have you the invoice?

A. Yes, sir.

Q. How many pounds of tobacco at seventy-five cents per pound are named there?

61 A. 1,176 pounds.

Q. How many pounds of other tobacco?

A. 248 pounds.

Q. What is the usual weight of a bale of Sumatra tobacco?

A. Average from 160 to 175 pounds, sir; 165 to 175 pounds.

Q. The average bale?

A. A bale of Sumatra generally weighs about 160 to 175 pounds. It varies.

Q. How much did it weigh in this case?

A. About 165 pounds, sir.

Q. What kind of tobacco was the tobacco upon which you levied a duty of thirty-five cents a pound?

A. That was filler.

Q. Do you know what country it was grown in?

A. The filler? I do not. I judge from my knowledge and belief it was a Havana filler.

Q. It was a Havana filler?

A. Yes, sir.

Q. It wasn't Sumatra tobacco at all?

A. No, sir. I don't think it was.

Q. There was no duty distinguishing it from the leaf tobacco, was there?

A. No, sir; none.

Q. Neither in quality or in quantity?

A. No, sir.

Q. How did you separate it?

A. It was separated by a strip of paper—a narrow strip of paper placed through the bale.

62 Q. You simply took a part of the tobacco, and, having weighed it, took the other part and weighed?

A. Yes, sir.

Q. And there was no practical difficulty in doing this?

A. No, sir.

Q. There was force enough in the office to do it, as far as the labor was concerned?

A. As far as that was concerned, yes, sir.

Q. Had you ever before this had the question brought to you about dealing with Havana tobacco filling—fit for fillers—found in Sumatra tobacco bales?

A. No, sir; I don't remember.

Q. You are able to tell a bale of Sumatra tobacco from a bale of Havana tobacco by its appearance, at once, are you not?

A. I should judge I was.

Q. And you can tell a bale of Sumatra tobacco from a bale of domestic tobacco by its appearance, at once, can't you?

A. Yes, sir; as a rule.

Q. And so with all the different tobaccos?

A. Yes, sir.

Q. And a large per cent. of the Sumatra tobacco which is admitted at thirty-five cents per pound comes in bales from Sumatra, does it not?

63 A. Yes, sir.

Q. That is, the packages are bales of Sumatra tobacco?

A. Yes, sir.

Q. You say they contain a certain percentage of large leaf and a certain percentage of smaller leaf tobacco?

A. Yes, sir.

Q. But all the tobacco is fit for wrappers?

A. Exactly so.

Q. [illegible] in the case of this importation part of the tobacco was not fit for wrappers?

A. Not fit for wrappers; no, sir.

Q. Now, what is the reason that you cannot in the present instance separate the inferior wrappers from the superior wrappers, to use that phrase, in the bales as they ordinarily come from Sumatra nowadays?

A. In the first place, you would have to count every hand—every leaf—and you would destroy the package entirely.

Q. But you found no difficulty of that sort in dealing with the packages now the subject of inquiry?

A. No, sir.

Q. So that the difficulty, if there is any difficulty at present, is simply the one of undertaking to execute the law by distinguishing the two classes of tobacco?

A. It would be impracticable entirely, in my opinion. In the first place, it would destroy the goods.

Q. How long have you been familiar with the importation of Sumatra tobacco?

64 A. Some four or five years.

Q. How do the bales that come at present differ from those that came from Sumatra before the passage of this act?

A. They differ in the mode of this repacking—the separation to distinguish the percentage in the bale.

Q. Previous to the passage of this act this Sumatra tobacco was quite uniformly of this superior quality, was it not?

A. Yes, sir; there was no question whatever about the percentage. The leaf was thirty-five cents.

Q. This filler tobacco which you found in these bales, was that of a superior or inferior description of filler tobacco?

A. Very inferior.

Q. Very inferior to the description of tobacco for any purpose?

A. Yes, sir.

By plaintiff's counsel:

Q. It was perfectly obvious that of all that which you called the filler tobacco, which you classified as thirty-five cents, no part of it whatever was of the requisite size and necessary fineness of texture to be suitable for wrappers?

A. No, sir; no part of it.

Q. Whereas, in respect to that which you classified as seventy-five cents per pound, all—in your judgment, the whole was of the

65 requisite size and of the necessary fineness of texture for wrapper tobacco?

A. Exactly.

Q. The Falk tobacco all bore evidence of having been repacked somewhere in Amsterdam?

A. Yes, sir.

Q. It wasn't in the original package as it came from Sumatra—that is, the bale was the same, but there had been some addition made to it?

A. Yes, sir.

Q. This tobacco which had been put into the package now, this Sumatra tobacco of a different sort, that is put in at Amsterdam?

A. Yes, sir; the same way.

Q. Then the bales are opened at Amsterdam and the heavier tobacco put in?

A. Yes, sir; repacked.

Q. All this that is coming in now is repacked just the same as the others? The only difference is what they put in before for wrappers is also put in for fillers?

A. Yes, sir.

Q. The bales that are coming in now are all repacked bales, just the same as the others were?

A. Yes, sir.

Q. And the only difference in the bales that are coming in now is that the 17 per cent. is all of wrappers, whereas before it was all of fillers?

A. Before it was all fillers.

Q. Now it is all large leaf, so that it doesn't take one hun-
66 dred leaves to weigh a pound; so you put it down at thirty-five cents?

A. Thirty-five cents; yes, sir.

Both parties thereupon rested, and counsel for the plaintiffs moved the court for the direction of a verdict in favor of said plaintiffs for the amount claimed by them herein; which motion was denied, and the court refused to direct such verdict; whereupon the counsel for said plaintiffs duly excepted to such ruling and refusal, which exception was duly allowed.

The court thereupon directed the jury to find a verdict for the defendant; to which ruling and direction the counsel for said plaintiffs duly excepted, which exception was duly allowed.

The jury thereupon found by direction of the court a verdict for said defendant. And inasmuch as none of said exceptions so offered and taken appears upon the records of said trial, therefore on the prayer of the said plaintiffs, by their counsel, the said judge has signed this bill of exceptions *nunc pro tunc* as of the twenty-eighth day of January, in the year one thousand eight hundred and eighty-six.

(Signed) N. SHIPMAN, *Judge.* [L. S.]

67 [Endorsed:] U. S. circuit court, so. dist. of New York. Gustav Falk and Arnold Falk against William H. Robertson. Bill of exceptions. A. W. Evarts, plaintiffs' attorney, 52 Wall street.

(Endorsed:) U. S. circuit court. Filed Sept. 4, 1886. Timothy Griffith, clerk.

68 Supreme Court of the United States.

GUSTAV FALK and ARNOLD FALK, Plaintiffs in Error,
ag't
WILLIAM H. ROBERTSON, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said Court, at the Capitol, in Washington, come the said plaintiffs in error, by A. W. Evarts *his* attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given

for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which they have lost by occasion of said judgment, &c.

A. W. EVARTS,
Attorney for Plaintiffs.

69 [Endorsed:] 9431. United States Supreme Court. Gustav Falk & Arnold Falk, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Assignment of error. A. W. Evarts, att'y for plaintiff in error. Due and timely service of a copy of the within assignment of error is hereby admitted. Dated New York, Sept. 23, 1886. Stephen A. Walker, att'y for defendant in error. U. S. circuit court. Filed Sept. 24, 1886. Timothy Griffith, cl'k.

70 Supreme Court of the United States.

GUSTAV FALK & ARNOLD FALK, Plaintiffs in Error,
vs.
W. H. ROBERTSON, Defendant in Error. } 9431. Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, his attorney, comes here into Court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error.

71 [Endorsed:] 9431. United States Supreme Court. Gustav Falk & ano., plaintiffs in error, *vs.* W. H. Robertson, defendant in error. Joinder in error. Stephen A. Walker, attorney for defendant in error. Due service of a copy of the within is hereby admitted this 24th day of September, 1886. A. W. Evarts, att'y for plaintiffs. U. S. circuit court. Filed Sept. 24, 1886. Timothy Griffith, cl'k.

72 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

GUSTAV FALK and ARNOLD FALK
vs.
WILLIAM H. ROBERTSON } Bond for Damages and Costs.

Know all men by these presents that we, Rudolph M. Myres and Moses Wallach, are held and firmly bound unto the above-named William H. Robertson in the sum of one hundred and thirty-eight dollars, to be paid to the said William H. Robertson; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the fourteenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-named Gustav Falk and Arnold Falk have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Gustav Falk and Arnold Falk shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

RUDOLPH M. MYRES. [L. S.]
MOSES WALLACH. [L. S.]

Sealed and delivered and taken and acknowledged this 14th day of September, 1886, before me—
R. S. HAYWARD.

73 [Endorsed:] 9431. Vol. —, page —. U. S. circuit court, southern district of New York. Gustav Falk and Arnold Falk *vs.* William H. Robertson. Bond for costs on writ of error. A. W. Evarts, plaintiffs' attorney. I approve the foregoing bond as to form and sufficiency. Dated New York, September, 1886. (S'g'd) Addison Brown. (File-mark:) U. S. circuit court. Filed Sept. 17, 1886. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern District of New York; } *ss:*

Rudolph M. Myres and Moses Wallach, being each duly sworn, doth depose and say that he is a householder in the city of New York, and that he is worth the sum of two hundred and seventy-six dollars over and above all his just debts and liabilities.

RUDOLPH M. MYRES. [L. S.]
MOSES WALLACH. [L. S.]

Sworn to this fourteenth day of September, A. D. 1886, before me—

(S'g'd) R. S. HAYWARD,
[NOTARIAL SEAL.] *Notary Public, N. Y. Co.*

74 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Gustav Falk and Arnold Falk are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this seventeenth day of September, 1886.

ADDISON BROWN, *Judge.*

75 [Endorsed:] 9431. U. S. Supreme Court. Gustav Falk and Arnold Falk, plaintiffs in error, against William H. Robertson, defendant in error. Citation. A. W. Evarts, att'y for plaintiff-in error, 52 Wall street, New York city. Service of a copy of the within citation is hereby admitted this 17 day of September, 1886. Stephen A. Walker, attorney for defendant in error. U. S. circuit court. Sep. 17, 1886. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 301. Gustav Falk and Arnold Falk, plaintiffs in error, *vs.* William H. Robertson, late collector of the port of New York. Filed March 1, 1887.

Office Supreme Court U. S.
FILED
OCT 22 1890
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 35.

GUSTAV FALK AND ARNOLD FALK,
Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON, LATE COLLECTOR OF THE PORT OF NEW YORK,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JOSEPH H. CHOATE,
CHARLES C. BEAMAN,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 35.

GUSTAV FALK and ARNOLD FALK,
Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON, late Collector of the Port of New York,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is an action brought to recover an excess of duty alleged by the plaintiffs in error to have been illegally exacted by the defendant on certain five invoices of "leaf tobacco," imported and entered at the Port of New York between the 14th of January and the 15th of April, 1884 (Rec., pp. 2–10).

The action was originally commenced in the Supreme Court of the State of New York, and was subsequently re-

moved on *certiorari*, by the defendant, to the Circuit Court of the United States for the Southern District of New York.

The duty paid by the plaintiffs amounted to the sum of $8,408, whereas they claim that the true and correct amount of duty payable on said tobacco was but $5,113.85. The amount of the alleged excess of duty thus exacted is, therefore, $3,294.15 (Rec., pp. 4; 9–10).

It was admitted that the plaintiffs filed a proper protest and appeal, and that they brought this action within the statutory time (Rec., pp. 9–10).

The plaintiffs are importers of and dealers in tobacco, and at the time of the trial had been in the business for about twenty years. They imported the tobacco referred to in the complaint. This was all leaf tobacco, and they paid the duties thereon as specified in the bill of particulars (Rec., pp. 6; 9–10; 28).

The duty imposed on this tobacco was exacted in pursuance of what was claimed by the Government to be the proper construction of the provisions of Schedule F of the Act of March 3, 1883 (22 Sts., 488, 503), the material paragraphs of which are as follows:

> "*Leaf tobacco, of which* eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be *suitable for wrappers, and of which* more than one hundred *leaves* are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.
>
> "*All other tobacco in leaf*, unmanufactured, and not stemmed, thirty-five cents per pound."

The tobacco in this case was all unstemmed; in fact, the plaintiff, Arnold Falk, says that in all his experience he never saw a leaf of stemmed tobacco of any kind sold in this country (Rec., p. 13). Of the importation in question, this plaintiff says:

> "That tobacco was *leaf tobacco;* there was *not a single bale of that tobacco of which eighty-five per*

cent. was of the requisite size and of the necessary fineness of texture to be suitable for wrappers.

Q. *Was eighty-five per cent. of the invoice as a whole* of the requisite size and of the necessary fineness of texture to be suitable for wrappers?

A. *No.*"

Rec., pp. 9–10 and 28 (top).

The points at issue in this Court, and the assignment of error, cannot be better stated than in the protest, a form of which was introduced in evidence (Rec., pp. 10–11).

It appears that two rates of duty were imposed on each invoice. In other words, the leaf tobacco in the invoices was separated into two classes one of which was appraised at thirty-five cents, and the other at seventy-five cents per pound. The amount appraised at thirty-five cents per pound constituted about seventeen per cent. of the entire invoice or importation. With reference to this state of facts, the protest addressed to the Collector proceeds:

> "This liquidation shows that you have considered that the greater portion of this invoice was suitable for wrappers, and that it had the other characteristics stated in section 660 [Morgan's Tariff], and was dutiable thereunder at seventy-five cents per pound, and that you have considered that the balance thereof was not suitable for wrappers and was therefore dutiable under section 661 [Morgan's Tariff] at thirty-five cents per pound. Your liquidation does not show the manner in which you made your separation of *our leaf tobacco*, but *it would seem as if you had not considered the invoice as a unit, nor even the bale as a unit*, but that you had, in some arbitrary way, *separated the leaf tobacco into two portions and applied one rate of duty to one portion and another rate of duty to another portion, without any reference to the proportion which these two portions bore to each other.* The sections quoted from the tariff clearly mean that *leaf tobacco* is to be *dutiable at thirty-five cents* per pound, *unless eighty-five per cent. of it is of the requisite size and of the necessary fineness of texture* to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound.

Now, your liquidation of our tobacco shows on its face that, in your opinion, taken as a whole, eighty-five per cent. thereof is not of the requisite size, &c., to be suitable for wrappers, &c.; *otherwise you would have found the whole of it dutiable at seventy-five cents per pound.* We also know as a fact, as you probably do, that, in the above invoices, there is not a single bale eighty-five per cent. of which is of the requisite size, &c., to be suitable for wrappers.

You cannot, then, have considered either the whole invoice or the single bale as a unit with reference to which the percentage of eighty-five per cent. is to be determined, but you have seen fit to determine the percentage with reference to some other unit.

We know that *neither eighty-five per cent. of the whole invoice, nor eighty-five per cent. of any bale thereof is leaf tobacco possessing the characteristics stated in section* 660, and under such state of facts we claim that none of our leaf tobacco in this invoice is dutiable at seventy-five cents per pound, but that *it is only dutiable at thirty-five cents per pound*" (Rec., p. 11).

The appeal of the plaintiffs to the Secretary of the Treasury is as follows:

"We hereby appeal from the decision of the Collector of Customs in assessing duty at the rate of *thirty-five* cents per pound on *one portion* and at the rate of *seventy-five* cents per pound on *another portion* of certain leaf tobacco contained in eighty-five bales, imported by us per steamer *W. A. Scholten* on the 22d of January, 1884, from Rotterdam, and *we claim that the whole of said leaf tobacco should pay duty only at the rate of thirty-five cents* per pound, *for the reasons, among others, as set forth in our protest* of the eighth instant, duly filed on that day with the Collector of Customs of New York for transmission to you" (Rec., pp. 11–12).

There are two kinds of leaf tobacco, one called wrappers and the other fillers or binders, the latter being used for filling purposes and for a secondary or inner wrapper.

These names were well recognized in the trade prior to the passage of the act in question. Nevertheless, the so-called wrapper tobacco is not *in fact* always suitable for wrappers. So far, however, as the *dealer* is concerned, or knows, *it is considered to be all suitable for that purpose*, and is so treated in the trade and in buying and selling (Rec., pp. 12; 18 (top).

It is possible for one to tell exactly what is and what is not *in fact* suitable for wrappers *only by a minute examination of each leaf after wetting it* and subjecting it to the usual processes of the cigar maker.

As the plaintiff, Arnold Falk, says:

> "*The only one who can determine that is the man who uses the wrapper tobacco* and makes cigars—the man who works up the tobacco.
>
> Q. What has he got to do with that tobacco before he can tell?
>
> A. *He has to wet it*, to get it into such a condition that he can apply it—to cut it and use it for wrapper purposes on the cigars.
>
> Q. And then in working and making cigars and unfolding any of the leaves which are not wet he may find some that is not fit for wrappers?
>
> A. Yes, sir.
>
> Q. Then *he can only find out by actually handling the wrapper?*
>
> A. Yes, sir.
>
> Q. *That is the only way you would be able to tell which is ultimately clear wrapper tobacco?*
>
> A. *Yes*" (Rec., p. 18).

Prior to the passage of this act there was *generally, but not invariably*, one kind of tobacco in a bale. That is, it was either all wrappers or all fillers, or all Sumatra or all Havana, &c., in a given bale (Rec., pp. 15-16; 22 bot., and 23). But prior to the passage of the act, it must be remembered, there was no occasion, as the law then stood, to determine this percentage of tobacco suitable for wrappers, pursuant to the standard fixed by the act (Rec., p. 30).

Leaf tobacco is sold by the farmers who raise it at so much per pound, and is then separated by the merchants dealing in it into wrapper and filler tobacco (Rec., p. 17). All foreign leaf tobacco is bought and sold by examining the individual *bales* (Rec., pp. 13–14). American tobacco, however, is sold by sample, a given number of "hands" being selected by an inspector for examination (Rec., p. 14). A "hand" of tobacco consists of a number of leaves put together (Rec., p. 14).

At the date of the act in question, leaf tobacco was generally bought and sold at so much per pound *by the bale*. The plaintiff says:

> "Q. A customer would buy a certain number of bales and pay for it at so much per pound?
> A. Yes, sir.
> Q. That was the practice with all sorts of leaf tobacco at the date of the act?
> A. Yes, sir" (Rec., p. 15).

Tobacco is and always has been imported *by the bale*. As the Government Appraiser, called on behalf of the plaintiffs in the present action, testified:

> "Q. And that is true now, isn't it, that it always has from the beginning, as far as your knowledge goes, down to the present time, *come in bales?*
> A. Yes, sir.
> Q. *It has been entered by the bale?*
> A. Yes, sir.
> Q. *Described in the invoice by the bale?*
> A. Yes, sir.
> Q. And *received and disposed of under the Treasury regulations by the bale as to appraisal and as to warehousing and as to withdrawal?*
> A. Yes, sir" (Rec., p. 27).

And the appraiser further tells us that the *bale* has always been accepted and used as the basis and unit for appraisal and levying of duties up to the present importation. He says:

> "Q. And *have you ever known any instance before the attempt had been made in this case* in respect to

an invoice or importation *to appraise it for duty except by the bale?* A. *No, sir; only by the bale.*

Q. *As a unit by the bale?*

A. Yes, sir.

Q. And in respect to any other class of merchandise that comes in in packages or bales, *have you ever known of any attempt on the part of the Government to fix the rate of duty or appraise it except by and upon the bale, bale per bale?*

A. *That is the only way; yes, sir, bale by bale*" (Rec., pp. 27–28).

That is to say, the duty has always been imposed at the rate of so much per pound—"pounds contained in that *bale*." (Rec., pp. 27–28).

Bearing in mind that, by the Act of 1883, the Government and the importers were for the first time called upon to deal with this method of classification and division of leaf tobacco by this prescribed percentage standard, in connection with the requisite standard of weight, we come now to the *practice* of the government under this statute, and to the facts connected with the particular importations in question. These importations, as we have said, were made between the 14th of January and the 15th of April, 1884.

On July 9, 1883, the plaintiffs wrote the Secretary of the Treasury as follows:

> "*We are the most extensive importers of Sumatra leaf tobacco* from Holland on which duties have been increased under Schedule F in new tariff bill, per annexed slip, *this being the only leaf tobacco which is affected* by the stipulation of '85 per cent. wrappers and more than 100 leaves to the pound.'
>
> "Information has reached us to the effect that parties are offering these tobaccos in this market, to arrive, *with the understanding that a certain quantity of short tobacco, unfit for wrappers, shall be packed in each bale to lower the percentage of wrappers and enable the entire bale to come in under the 35 cents rate*, or in an invoice of say 25 bales, 20 bales will be choice wrappers and 5 bales common

fillers, thus bringing the average down to the lower rate of duty.

"We would respectfully ask you to *favor us with your ruling on the legality of this action, as, if allowable, we shall be compelled to adopt the same tactics, in order to protect our business* in the competition which will necessarily arise if this mode of evading the higher rate of duty is followed by others."

Rec., p. 19.

In answer to this letter of the plaintiffs, the Treasury Department wrote, under date of July 18, 1883:

"For reply to your letter of the 9th instant you are *referred to the accompanying copy of decision No. 5715, which interprets the provision of law you cite* relating to Sumatra tobacco, as applying to *each bale and not to each invoice.*"

Rec., p. 19.

Treasury Decision No. 5715, which, with the other Treasury decisions on this subject, is, for convenience, printed at the end of this brief, provides, under date of May 18, 1883, as follows:

"The question involved is what is meant by 85 per cent.? Is it 85 per cent. of each package or 85 per cent. of the whole number of packages covered by one invoice? The department decides that *the limitation of 85 per cent. refers to each package, and not to each invoice.*"

Under date of July 16, 1883, the plaintiffs wrote to the defendant, the Collector of Customs at New York, as follows:

"Referring to Department Decision No. 5715, relating to the limitation of 85 per cent. wrappers in each bale tobacco necessary to the higher rate of duty under new tariff bill taking effect July first instant, would state, that Sumatra tobacco, wholly wrappers, has been offered in this market, to arrive from ports in Holland, in each bale of which it is proposed to *pack sufficient small tobacco* (fillers) *to*

reduce the average of wrappers below the 85 per cent. limitation, and thus allow the entire bale to come in under the 35 cent rate instead of 75 cent, as intended by this 85 per cent. limitation.

Please kindly favor us with your ruling on the legality of this action, as being the most extensive importers in the past of this class of tobacco, we must protect our interest against undue competition by being prepared to adopt such measures as others in our trade are allowed to use."

Rec., p. 20.

Under date of July 19, 1883, the Collector, in reply to this letter, stated that the practice of his office was to decide questions only upon actual importations, and not to answer merely hypothetical questions. Continuing, the Collector said:

"The matter of the importations of the character referred to is *under consideration*, however, and when definite action has been taken, you will be informed upon calling at this office."

Rec., p. 20.

Under date of the 25th of October, 1883, the plaintiffs again wrote to the Secretary of the Treasury calling his attention to an importation of 10 bales of Sumatra tobacco from the port of Amsterdam, Holland, which had recently been received by them from their house at that port. In this letter the plaintiffs say:

"This tobacco was *packed and imported expressly for the purpose of testing* that portion of the new tariff, Schedule F, paragraphs 660 and 661 [Morgan's] taking effect on the first of July last, reading as follows."

After quoting the statute, the plaintiffs state that this importation was made—

"With reference to decision of your department No. 5715, dated May 18, 1883, 'that the limitation of 85 per cent.' refers to 'each package and not to

each invoice', which decision was mailed us with your letter of July 13, 1883, and *in accordance with which decision and the above letter we have made this venture.* This importation of 10 bales leaf tobacco contained, according to the returns of the Appraiser of this port 1660 pounds suitable for wrappers and upon which he levies a duty of 75 cents per pound."

After protesting, in substantially the same terms as those employed in the protest and appeal heretofore quoted, against this division of the contents of the importation into two distinct grades, the plaintiffs proceed:

"We would now respectfully ask you to give this matter your immediate and thorough consideration, and make such necessary ruling as will place these sections of the new tariff beyond the possibility of question.

"We confess that this law was undoubtedly framed for the purpose of prohibiting the importation of Sumatra tobacco, which has been a very important feature in our trade with Holland for the past three years, as *this tobacco is the only leaf which can possibly come under the restrictions,* the first referred-to section of the new tariff imposes—if packed in the manner customary previous to the taking effect of said new tariff. *We have consequently taken advantage of the exact reading of the law as it stands on record, and have caused our tobacco to be originally packed to contain less than the limitation of 85 per cent. of wrappers in each package and claim our distinct right to import at any and at all times during the existence of the present tariff such quantities of this tobacco as we may desire.*

"We have been by far the most extensive importers of this tobacco, and have paid duties on this leaf since the 1st January last to exceed $250,000. Our trade in these goods is a very important one, as you will readily perceive by above figures, and we desire to continue same, *if it can be done in conformity with the laws of the United States,* of which we are peaceful and law-abiding citizens. Hence, while there remains the least doubt in the minds of any of your subordinates as to the proper rendering

of the law relating to these importations, we consider it your duty to fully instruct them without delay as to the correct reading of same, so as not to *impede the regular course of a very important trade.*"

Rec. pp. 21, 22.

Under date of October 31, 1883, the Treasury Department answered this letter of the plaintiffs, stating that the department could render no decision on a case, except under protest and appeal, in due course, but at the same time stating—

"Your letter, however, has been forwarded to the collector with instructions to take the statements that you make into consideration upon the receipt of the appeal, and to forward all the papers with a report of his views to the Department."

On November 7, 1883, the defendant, as Collector of the Port of New York, in answer to this letter from the Treasury Department, referred to in the above letter of October 31, 1883, sent to the Department all of the information in his possession in reference to this importation of 10 bales, and said—

"If the law as construed in your decision of the 18th of May last (S. S. 5715) imposes duties at 75 cents or one dollar per pound on leaf tobacco only in cases where 85 per cent. of each package of tobacco is of requisite size and fineness for wrappers, then packages containing less than that quantity of such tobacco are not, it seems to me, liable to those rates of duty.

"The appraiser speaks of 'an intent to avoid the law,' but there is no law which requires that an importer shall have in an importation 85 per cent. of a specified quality, and consequently it is, in my judgment, *quite competent for him to have his tobacco so packed or re-packed that it might escape the highest rates of duty. The law makers have fixed a standard which may be defective,* in the language of

the United States Supreme Court in the case of Welsh *v.* Merritt (S. S. 5154)."

This letter was omitted from record by mistake and is printed at the end of this brief.

On November 10, 1883, the Treasury Department wrote to the plaintiffs, acknowledging the receipt of their letter of the 25th of October, 1883, above quoted, and saying:

> "In reply, you are informed that the Department has disposed of the case by instructions *this day* addressed to the Collector of Customs at New York, to whom you are referred for particulars."
>
> Rec., p. 22.

Through some oversight, this letter of November 10, 1883, from the Department to the Collector of Customs at New York, was also omitted from the record, but is printed at the end of this brief. As these letters are documentary evidence which can be readily obtained, we suppose there is no objection to our incorporating them, inasmuch as they merely complete a series of letters in evidence herein. This letter of November 10th to the Collector is not only referred to in the Department letter to the plaintiffs, just quoted, but is also referred to in the appeal of the plaintiffs to the Department, as follows:

> "The leaf tobacco in these bales was bought and imported by us in full reliance upon the correctness of *your decision, as announced in your letter of the 10th of November*, 1883, *to the Collector of New York, such last letter having been written by you after a full statement by letter from us to you of our purposes* in the matter, and after a report from the Appraiser of this Port with reference thereto."
>
> Rec., p. 12.

This letter, therefore, to the Collector, becomes of considerable importance. Referring to the letter of the Collector, under date of the 7th of November, from which we have quoted above, in reference to a certain importation

of 10 bales of leaf tobacco by the plaintiffs, the Department, after describing the manner in which the bales were packed with Sumatra leaf tobacco, surrounded by a quantity of inferior leaf tobacco, fit only for use as fillers, and after referring to the fact that the bale had undoubtedly been repacked in Holland, and to the further fact that the appraiser had separated the tobacco, levying a duty on all of the inferior tobacco of 35 cents per pound, and on the superior tobacco of 75 cents per pound, and in view of the Department Decision No. 5715, to the effect that the 85 per cent. specified in the law had reference to each package of the invoice, said:

> "*The law does not specify how tobacco shall be packed, nor is there any limitation of the manner of its packing. None of the bales in question as imported contain, it is understood,* 85 *per cent.* of leaf tobacco of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and *if so, none of it is dutiable under the provision of law referred to.*
>
> "*If there is* 85 *per cent. or over of leaf tobacco in any bale, suitable for wrappers, the whole of such bale is dutiable under paragraph* 246."
>
> See letter printed at the end of this brief.

This correspondence fully explains the character of the present importation, and the reasons for the packing and repacking of the bale, and for the appearance of the two kinds of tobacco therein.

The bales contained in this importation consisted of wrapper and filler leaf tobacco, the filler tobacco being placed on top of the original bale of Sumatra leaf, and being separated therefrom by a strip of paper. Enough of the inferior or filler leaf tobacco was put in each bale to make more than 15 per cent. of the whole bale. The original bales of Sumatra tobacco were repacked in this way, in Holland (Rec., pp. 16–17; 30).

In reference to this repacking, the plaintiff, Arnold Falk, says:

> "Q. You have spoken about the method in which you repacked these bales as it were. You *didn't*

import these bales, or pack them, did you, until after you had received the communications from the Secretary of the Treasury, one under date of May 18th, 1883, and one of date, February [Nov.?] 10th, 1883?

A. *No, sir; we had these cases inquired into* at the Department, and they told us they couldn't tell us anything definite about it. We should only make the actual importation to be such classes of tobacco and they would decide on it.

Q. Then you imported 10 bales?

A. *Then we imported* 10 *bales.*

Q. *Those* 10 *bales were packed just as you have described?*

A. *Yes, sir.*

Q. *Just as advised?*

A. *Yes, sir, the bale alone.*

Q. *You had that test case, and then after that was decided in your favor you went ahead and made the large entries?* A. *Yes, sir.*

Q. And Sumatra tobacco, as I understand it, comes from the island of Sumatra, and is for sale in Holland?

A. Yes, sir.

Q. And that is where the merchants buy it?

A. Yes, sir.

Q. And the bales which you imported were bales as they came from Sumatra, except that while they were in Holland you there opened each bale and in that bale you put more than 15 per cent. of the dutiable amount in fillers?

A. Yes, sir.

Q. And then you tied up the bale again?

A. Yes, sir.

Q. So that the outside bale as it came here was just as it originally came from Sumatra, but you had altered the contents of it by adding this?

A. Yes, sir.

Q. *You altered it in the same way as you did with the* 10 *bales?*

A. *Yes, sir.*

(Rec. pp. 18–19).

It frequently happened that the plaintiffs, after the arrival of the importation, separated the bales again and sold the original Sumatra leaf, and the filler tobacco added

thereto, separately. This was not always the case, but the plaintiffs sold the tobacco both ways—just as it was imported, and also after separating the two kinds, as we have described (Rec., p. 17).

The government appraiser states that, in his opinion, this filler tobacco was Havana leaf of a very inferior kind and not Sumatra leaf (Rec., pp. 28–30.) That part of the bale consisting of filler tobacco was not fit for wrappers (Rec., p. 29).

Prior to the passage of the statute in question, there was no occasion to determine the percentage of superior tobacco, all leaf tobacco being imported under a duty of 35 cents. The bales of Sumatra tobacco were not at that time opened and repacked in Holland, and the bales dealt in contained about 160–175 pounds of Sumatra tobacco, and the difference between such a bale and the present importation consisted in the addition of this filler or inferior leaf tobacco in Holland (Rec., p. 23; 28; 30).

These bales were repacked, as we have seen, in precisely the same way as the test importation of the ten bales (Rec., p. 19) upon which the decision of the Department had been obtained by the plaintiffs, fully sactioning the proposed method of packing.

The importation as appraised consisted of a certain number of pounds, which was classed as superior or wrapper tobacco, and upon which a duty of 75 cents was levied, and of the remainder, consisting of other or inferior filler leaf tobacco, upon which a duty of 35 cents was levied. This inferior tobacco, it will be observed, constituted about 17½ to 18 per cent. of the whole importation (Rec., p. 28).

No bale of the importation contained 85 per cent. of tobacco suitable for wrappers (Rec., p. 23). And no part of the filler tobacco (that upon which a duty of 35 cents was imposed) was of the requisite weight and fineness to be suitable for wrappers; but *all* of that upon which the duty of 75 cents was imposed was suitable for wrappers within the terms of the act (Rec., pp. 30 and 27).

While Sumatra tobacco usually weighs, as we have seen, from 160 to 175 pounds to the bale, each of the bales in this case weighed, at the time of the appraisal, 165 pounds (Rec., p. 28).

This method of packing the tobacco has been recognized by the Department, in the business of the Appraiser's office, ever since the passage of this act, and the separation of the two classes of tobacco by the slip of paper was *made in accordance with the suggestion of the Collector's office at New York, so that the different percentages of the respective kinds of tobacco could be easily distinguished* (Rec., pp. 19 and 24).

In making the appraisement for the purpose of levying duty upon leaf tobacco under this new law, the appraiser can and did make only a *general examination.* The appraiser says:

> "I don't examine each particular leaf and wet it and test it to determine whether each leaf is suitable for wrappers.
>
> Q. How do you distinguish leaf tobacco for wrappers from leaf tobacco not suitable for wrappers?
>
> A. *By the separation of the bale by the small slip of paper* in the bale which separates tobacco for the purposes of arriving at the percentage easily."
>
> Rec., pp. 23 and 29.

The appraiser then proceeds to state that—

> "It would be *almost impossible to determine without separation in that way.*
>
> Q. It is done in order to facilitate the classification?
>
> A. *It would be almost impossible to determine it without it.*
>
> Q. It would be almost impossible to determine unless the tobacco was separated?
>
> A. *It would be practically impossible.*"

The appraiser then says that it would not be possible to determine the character of the tobacco by ascertaining the

percentage of each kind in each hand of tobacco. He says:

> "*That would be also practically impossible;* it would require more separation and would require more force than we have got to do it. Besides *it destroys the package.*
>
> Q. It would *necessitate the tearing of each particular package to pieces?*
>
> A. Yes, sir.
>
> Q. *And examining each leaf in each hand?*
>
> A. Yes, sir."
>
> Rec., pp. 23–24.

And he further says on the same subject—

> "In the first place, you would have to count every hand, every leaf, and you would destroy the package entirely."
>
> Rec., p. 29.

He then states that the difficulty which would ordinarily be found in separating superior from inferior wrappers in a bale, by examining each hand or leaf, was not found in dealing with the packages in question. He is then asked:

> "Q. So that the difficulty, if there is any difficulty at present, is simply the one of undertaking to execute the law by distinguishing the two classes of tobacco?
>
> A. *It would be impracticable entirely, in my opinion. In the first place, it would destroy the goods.*"
>
> Rec., p. 30.

This testimony had reference to the examination of the bales of tobacco hand by hand, and leaf by leaf.

In other words, according to the uncontradicted testimony of this expert appraiser, the separation of the different grades or classes of tobacco by the slip of paper in the bale, suggested by the Government, is the only

practical method of arriving at any classification whatsoever (Rec., p. 24).

While, as we have seen, it has always been the commercial and official usage, to regard the *bale* as a unit for the purposes of trade and of appraisement for duties, yet in this case the invoice and bales were *arbitrarily divided*, and a given number of pounds of the tobacco was assessed at 75 cents, and upon the remainder of the invoice and bales a duty of 35 cents was imposed, thus making *two classes of tobacco in the same invoice and in the same bale*, appraised and levied upon at *different rates*.

As the appraiser says, he considered *all* of that which he classed at the 75 cent rate as suitable for wrappers (Rec., p. 27), and *all* of that which was appraised at the 35 cents rate as absolutely unsuitable for wrappers (Rec., p. 30).

The complaint which the plaintiffs make of this method of levying duty in this case is plainly expressed in their letter of October 25, 1885 (Rec., p. 21), and in their protest and appeal herein (Rec., p. 11–12), from which we have already quoted.

It may be noted that, even to-day, this Sumatra tobacco is *still repacked* in Amsterdam, but that, instead of filler leaf tobacco being put into the bale, it is repacked with *heavy leaves* of *wrapper* tobacco, so that only about eighty per cent. of a bale will consist of leaves of which more than one hundred are required to weigh a pound. It is all one kind—wrapper tobacco—however, and is being imported under a thirty-five cents duty (Rec. pp. 24–25, 30–31).

The foregoing statement of facts makes it perfectly clear that the plaintiffs have been actuated by the strictest good faith in all of their dealings with the government in this matter, and that they have simply sought to do what was legal, and at the same time to protect themselves against undue competition, under a proper construction of the terms of the statute. Everything has been open and above board, and no evasion of any kind, on their part, has been attempted.

Upon the trial, the plaintiffs moved the Court for a di-

rection of a verdict in favor of the plaintiffs for the amount claimed by them, which motion was denied, to which denial the plaintiffs duly excepted. The Court thereupon directed the jury to find a verdict for the defendant, to which ruling and direction the plaintiffs also duly excepted. The jury then found, in accordance with this direction of the Court, a verdict for defendant (Rec., p. 31).

Assignment and Specification of Errors.

The plaintiffs claim that the Court below erred in refusing to direct a verdict for the plaintiffs herein for the sum of $3,294.15, with interest on the several sums specified in the bill of particulars, and therefore in refusing to hold that the statute required that there should be imposed only one rate of duty, namely, thirty-five cents per pound, upon all of the leaf tobacco referred to in said complaint and bill of particulars, and that it was error in the Court below to direct a verdict for the defendant, and thus to sustain as proper and legal the method of appraisement and classification of the leaf tobacco in question which had been in fact adopted by the defendant, that is to say, an appraisement which made a separation and division of the contents of each bale into two distinct classes, and which imposed upon each bale accordingly two distinct rates of duty, namely, a duty upon the superior class of tobacco, therein contained, of seventy-five cents per pound, and a duty upon the inferior class, of thirty-five cents per pound.

POINTS.

First Point.

The Act of March 3, 1883, clearly requires, in any case, that only one rate of duty shall be imposed upon the leaf tobacco in question, considered and appraised bale by bale, each bale being taken as a unit, and not one rate of duty on so much of the leaf tobacco, in a particular bale, as may be suitable for wrappers, and another rate on so much of such tobacco as may not be suitable for wrappers, under the standards fixed by the statute.

Section 2502 of the Revised Statutes, as amended by the act of March 3, 1883 (22 Sts., 488, 491), provides that there shall be levied, collected, and paid upon—

> "*All articles imported* from foreign countries and *mentioned* in the schedules herein contained, rates of duty which are by the schedules respectivly prescribed."

The question therefore which naturally arises at the outset is, as to which one of the "*articles imported*" we are at present interested in, for this is the only section of the statutes providing for the imposition of duties.

Of course, it is well settled that the constitutional power vested in Congress, to impose a duty on imports, contemplates a duty or tax, not on the act of importation, but on the *thing imported.*

> *Brown* v. *Maryland*, 12 Wheat., 419, at 437-438.

What is the article or thing imported, therefore, in this case, upon which the duty is imposed? It is, as we have seen, "*leaf tobacco*," and Schedule F, (and particular those portions known by the Treasury Department as

paragraphs 246 and 247,) of section 2503 of the Revised Statutes, as amended by the Act of 1883, provides (22 Stat. 503) for the duty thereon as follows:

> "*Leaf tobacco, of which* eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and *of which* more than *one hundred leaves* are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed one dollar per pound.
>
> "*All other tobacco in leaf*, unmanufactured, and not stemmed, thirty-five cents per pound."

The article or thing imported being "*leaf tobacco*," the further question arises as to whether, under this statute, it is dutiable at seventy-five cents or at thirty-five cents.

This question can be determined only by an application of the eighty-five per cent. standard and of the standard weight for one hundred leaves. If an application of those standards shows that the *article* imported, to wit, "leaf tobacco," is suitable for wrappers *and* is sufficiently light in weight, then *it* is to be dutiable at seventy-five cents per pound. If *it* appears to be below those standards, then *it* is dutiable at thirty-five cents per pound.

Throughout this brief, when speaking of the "article imported" or "the importation," we usually refer indifferently to whatever may be regarded as the *unit* of the importation for the purposes of appraisement. For all purposes, that *unit* is the same as the whole article imported, so far as the levy of duties is concerned, for only one rate of duty can, as we contend, be levied on this *unit*.

The "*article imported*," then, clearly must mean the whole of that article, the entire importation. As we shall show, for the practical purposes of appraisement, *each bale or package is a unit* and represents, to that extent, *the whole article imported*, and is *itself and as a whole* to be dutiable at one rate or the other, as the case may be. The statute clearly, and in terms, lays only one rate of duty upon the "*article imported*"—"leaf tobacco" in this case. That duty may be one rate, if the importation consists of

a certain class of leaf tobacco, or it may be a different rate, if the importation is made up of a different class of leaf tobacco, within the standard fixed by the statute. But the Government must, at its peril, determine the proper class to which *the importation* belongs, and must then levy *the one and only authorized rate* of duty upon *that importation*, as being the article imported within the meaning of the statute. There is no authority anywhere in the act, however, for dividing up the article imported into two distinct articles, so that one class of leaf tobacco, whatever percentage it may be of the whole, in a single importation, may be rated at seventy-five cents and another at thirty-five cents. Such a division of an invoice or importation is equivalent to a claim that there has been *a separate importation of each class of tobacco by itself.* For such a claim there is no possible foundation.

Nevertheless, that is really the theory upon which the duty has been imposed in this case, namely, that the plaintiffs have first imported an invoice of the eighty-five per cent. quality, dutiable at seventy-five cents, and that then they have made a separate importation of an inferior quality, dutiable at thirty-five cents. This, on its face, seems to be an absurdity.

The only thing taxed is the "leaf tobacco" imported. That is *one* of the "articles imported from foreign countries" mentioned under Section 2502 of the Revised Statutes as amended by this act. And *this leaf tobacco*, being indisputably shown to be not of the requisite fineness and weight to come within the seventy-five cents grade, must necessarily be dutiable at thirty-five cents. *All leaf tobacco*, in other words, is dutiable at *thirty-five* cents, *unless* it is shown to be of light weight and suitable for wrappers, within the standards fixed by the act. If the Collector had found eighty-five per cent. of this tobacco dutiable at seventy-five cents, then he might, according to the constitution of the individual bales, have been bound to impose that duty upon the whole of the importation. By dividing the importation, as he has done, *he confesses that eighty-five per cent. of it,*

and of each bale thereof, is not of the superior quality, and consequently that the whole is dutiable only at thirty-five cents.

The matter cannot be better expressed than it is in the protest filed in this very case. It is there said:

> "The sections quoted from the tariff clearly mean that *leaf tobacco is to be dutiable at thirty-five cents per pound* UNLESS *eighty-five per cent. of it is of the requisite size and of the necessary fineness of texture* to be suitable for wrappers and of which more than one hundred leaves are required to weigh a pound.
>
> "Now, your liquidation of our tobacco shows on its face that, in your opinion, taken as a whole, eighty-five per cent. thereof is *not* of the requisite size, &c., to be suitable for wrappers, &c., *otherwise you would have found the whole of it dutiable at seventy-five cents per pound.*
>
> "We also know as a fact, as you probably do, that in the above invoices there is not a single bale eighty-five per cent. of which is of the requisite size, &c., to be suitable for wrappers. *You cannot then have considered either the whole invoice or the single bale as the unit with reference to which the percentage of eighty-five per cent. is to be determined*, but you have seen fit to determine the percentage with reference to some other unit."
>
> Record, p. 11.

In other words, this 85 per cent. standard and the standard of weight fixed by the statute clearly refer to the leaf tobacco imported, to be appraised and classified as a whole and bale by bale.

It is a cardinal rule to be applied in the construction of statutes imposing duties upon imports that, in the case of doubtful or ambiguous phraseology, *that construction will be adopted which will be most favorable to the importer.*

Powers v. *Barney*, 5 Blatchf., 202.
Adams v. *Bancroft*, 3 Sumner, 384.
U. S. v. *Wigglesworth*, 2 Story, 369.
U. S. v. *Ullman*, 4 Ben., 547.
Hartranft v. *Wiegman*, 121 U. S., 609.

In the case last cited this Court said:

> "*If the question were one of doubt, the doubt would be resolved in favor of the importer*, as duties are never imposed on the citizen upon vague or doubtful interpretations" (121 U. S., at p. 616).

So far as there is any ambiguity or doubt as to the meaning of this statute, taking into account the great burden imposed upon the importer by a construction which would permit the Government to exact a separate duty upon so much of each separate kind of tobacco as might be found in a given importation or invoice, that construction, in this single instance, making a difference of several thousand dollars in the duty collected, we believe that this principle alone is sufficient, when applied to this case, to justify and require a reversal of the judgment below.

This Court gave forcible utterance to a truth applicable in all such cases, when it said:

> "Uncertainty and ambiguity are the bane of commerce. Discretion in the custom house officer should be limited as strictly as possible. It has been said with much truth: 'Where law ends, tyranny begins.'"
>
> *Merritt* v. *Welsh*, 104 U. S., 694, 702.

The statute must, therefore, as we claim, be so construed as to admit of the imposition of but one rate of duty upon the leaf tobacco in question, and that rate must be determined by an examination and appraisement of the invoice, bale by bale, each bale being treated as a unit for the purposes of appraisement.

It is a well-established rule of construction, followed by an unbroken line of decisions, that all acts levying duties on imports are, as regulations of commerce, to be construed in accordance with commercial usages and the understanding of men engaged in the particular trade in question. The language of the statutes will be presumed

to have been used in an ordinary commercial and popular sense.

U. S. v. 200 *Chests of Tea*, 9 Wheat., 430.
Barlow v. *U. S.*, 7 Pet., 404.
U. S. v. 112 *Casks*, 8 Pet., 277.
Elliot v. *Swartout*, 10 Pet., 137.
Curtis v. *Martin*, 3 How., 106.
Arthur v. *Cumming*, 91 U. S., 362.
Tyng v. *Grinnell*, 92 U. S., 467.
Arthur v. *Morrison*, 96 U. S., 108.
Arthur v. *Lakey*, 96 U. S., 112.
Greenleaf v. *Goodrich*, 101 U. S., 278.
Recknagel v. *Murphy*, 102 U. S., 197.
Robertson v. *Salomon*, 130 U. S., 412, 415.

As Mr. Justice STORY declared:

> "Acts of this nature are to be interpreted, *not according to the abstract propriety of language, but according to the known usage of trade and business at home and abroad.*"
>
> *U. S.* v. *Breed*, 1 Sumner, 159, 163.

Not only so, but it is also true that the construction given to such a statute and acted upon in practice by those charged with the duty of executing it, is not to be overruled without cogent reasons. A construction of a tariff act adopted by the Treasury Department, while not conclusive upon the courts, is entitled to weight and respectful consideration.

U. S. v. *Moore*, 95 U. S., 760.
Brown v. *U. S.*, 113 U. S., 568.
U. S. v. *Hill*, 120 U. S., 169.
U. S. v. *Johnston*, 124 U. S., 236.
McCall v. *Lawrence*, 3 Blatchf., 360, 363.
Smythe v. *Fiske*, 23 Wall, 374, 383.

While recently, in reference to the statute now in question, and particularly *subsequent* to this importation, the

Department and officials have so constantly and repeatedly vacillated over its construction as to render their opinion and practice of little, if any, weight, as we shall further show, yet, from the very beginning of tariff legislation, in respect to tobacco and all merchandise coming in *bales or packages*, it has been the uniform practice and usage of the customs officials to treat the *bale or package as a unit* for purposes of appraisal and classification. That has likewise been the *uniform commercial usage*. It is uncontradicted testimony in this case that tobacco has always been *bought and sold, imported, invoiced, and entered* BY THE BALE; and, as the expert appraiser tells us in this case, *it has always been*—

> "*Received and disposed of under the Treasury regulations by the bale, as to appraisal, and as to warehousing and as to withdrawal.*"
>
> Rec., p. 27.

He further testifies, as we have seen:

> "Q. And have you *ever known any instance before the attempt had been made in this case*, in respect to an invoice or importation, *to appraise it for duty except by the bale? A. No, sir; only by the bale.*
>
> "*Q. As a unit by the bale? A. Yes, sir.*

And as to all other classes of merchandise, his testimony is the same. As to that he is asked:

> "Q. And in respect to any other class of merchandise that comes in, in packages or bales, *have you ever known of any attempt on the part of the Government to fix the rate of duty, or appraise it except by and upon the bale, bale per bale?* A. That is the only way; yes, sir, *bale by bale.*"
>
> Rec., pp. 27–28.

Such has been the commercial usage, and such has been the practice of the Government under all tariff legislation,

and that usage and practice would certainly seem to be quite conclusive here. The bale or package of merchandise is, and always has been, the unit for purposes of appraisement, and it must, we believe, be so regarded in this instance. When the statute refers to 85 per cent. of the tobacco, as the "article imported," it must be assumed that Congress had in mind some definite and distinct unit or quantity from which that percentage was to be computed. Of course, the duty being levied upon the article imported—*the* leaf tobacco in question—the entire invoice or importation might, ordinarily speaking, be regarded as the unit upon which the duty is to be *levied;* but, in *practice*, where the merchandise is imported, as here, in separate bales and packages, some smaller and component unit must be used in making the *appraisement*, and in thus arriving at the percentage, and the *bale* has, as we have seen, been uniformly adopted and accepted as that unit. This act must be deemed to have been passed, and must be read, *in the light of that usage.*

This contention, that Congress regarded the bale or package as the unit from which to compute the percentage, is not only strengthened, but is rendered almost indisputable, by a consideration of the history of the enactment, and of the amendments proposed thereto from time to time during its progress toward final passage by the Senate, to which body it had been sent from the House.

In the act itself Congress has not *in terms* fixed upon a unit, for purposes of appraisement and the computation of the percentage. The words of the act, read alone and without other aid to construction, may be said to be in this respect doubtful and obscure. The rule of construction to be applied in such a case has been well defined by this Court. It is probably true that we cannot refer to the *motives or opinions* of individual members of Congress, but we certainly can refer to the circumstances surrounding the enactment of the law, and to the history of the act in question. The Court, in other words, is en-

titled to place itself, as far as practicable, in the position in which the legislature stood when it passed the law.

Bishop on the Written Laws, §§ 50 and 75.

This Court has accordingly declared that—

> "Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurrent enactments, to the *history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used.*"
>
> *Merritt* v. *Welsh*, 104 U. S., 694, 702.

And in a case involving the construction of a badly expressed and doubtful statute, the Court has been more explicit, and has referred to the journals of Congress for light on the question as to the legislative intent. The Court there said:

> "Under these circumstances, we are compelled to ascertain the legislative intention by *a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records,* and by giving such construction to the statute as we believe will carry out the intentions of Congress."
>
> *Blake* v. *Nat. Banks*, 23 Wall., 307, 319.

Referring to the history of the trade (showing purchases and sales and importations always to have been made *by the bale*) and to the history of this particular statute, we find ample support for our contention in this case.

The previous tariff act, which the Act of March 3, 1883, amended, contained only the following provision relating to unstemmed leaf tobacco:

> "*Tobacco in leaf*, unmanufactured, and not stemmed, *thirty-five* cents per pound."
>
> R. S. § 2504, Schedule J.

The subject of leaf tobacco was brought up in Congress during the discussion over the tariff legislation of 1882-1883, and as appears from the records of the Forty-seventh Congress (14 Cong. Rec.), both houses were flooded with petitions from Connecticut, New York and other States, praying for a duty which would exclude Sumatra leaf tobacco, suitable for wrappers (and that was its main, if not its only use), as its importation, at the then prevailing rate of duty, was proving ruinous to the domestic tobacco industry and growers. The leaf tobacco clause of the Tariff Bill of 1883, as it passed the House and as reported by the Senate Finance Committee, read as follows:

> "*Tobacco of all descriptions*, unmanufactured, including stemmed and *seed leaf tobacco, valued at forty cents per pound or over*, seventy-five cents; valued at less than forty cents per pound, thirty-five cents."
>
> 14 Cong. Rec., Part 3 (47th Cong., 2d Sess.), p. 2557; Part 2, p. 1897.

This clause of the bill excited considerable discussion, great difficulty having been experienced in finding suitable phraseology which would exclude the Sumatra leaf and, at the same time, not burden and injure the importation of the Havana tobacco. Senator SHERMAN proposed the following, as an amendment to the clause as reported:

> "*Tobacco in leaf*, unmanufactured and not stemmed, *used exclusively for wrappers*, seventy-five cents per pound; *all other tobacco*, unmanufactured and not stemmed, thirty-five cents per pound."
>
> 14 Cong. Rec., Part 2 (47th Cong., 2d Sess.), p. 1897.

The debate on this amendment and on the whole question was begun in the Senate on February 5, 1883, the Senators from Connecticut having the principal charge of the interests of the domestic tobacco growers as against

the Sumatra leaf. Senator HAWLEY then proposed the following amendment:

> "*Tobacco in leaf*, unmanufactured and not stemmed, when the *greater portion* of the *box, bale, or other package* is *suitable for wrappers*, seventy-five cents per pound upon the *whole contents* of said *box, bale, or other package;* if stemmed, $1 per pound.
>
> 14 Cong. Rec., Part 2, *supra*, p. 1897.

A long debate was then had over this amendment, and Mr. HAWLEY stated, and it became the subject of the entire debate, that the object of the proposed clause was to reach and exclude *Sumatra* tobacco; that this could not be done, directly, by specifying that tobacco, because such a statute would conflict with the existing treaties, and that it was his endeavor to accomplish the same object by employing proper phraseology which, in practice, would exclude all such tobacco.

> 14 Cong. Rec., Part 2, *supra*, at pp. 1897–1906.

This particular amendment, proposed by Mr. HAWLEY, was rejected (14 Cong. Rec., *supra*, at pp. 1903–1904), but the clause, as it finally came from the Committee of the Whole, did not differ in many respects from his amendment. It then read as follows:

> "*Tobacco in leaf*, unmanufactured, when *the greater portion* of the *box, bale or other package* is *suitable for wrappers*, 75 cents per pound upon the *whole contents* of said *box, bale or other package.*"
>
> See 14 Cong. Rec., Part 3, *supra*, p. 2564.

The consideration of this tobacco schedule then went over until February 13, 1883, when Senator SHERMAN announced that he was satisfied that the Senate had made a mistake, as he had been informed by a gentleman, whose letter he proceeded to read, that a large part of the importations of *Havana* tobacco *was suitable for wrappers*,

and the result of the adoption of the clause in its present state would be to exclude *Havana* tobacco also, greatly to the injury of the domestic trade.

14 Cong. Rec., Part 3, *supra*, p. 2557.

Senator PLATT (of Connecticut) then said:

> "I wish to say that *the gentleman who wrote the letter* which the Senator from Ohio [SHERMAN] read here, *has proposed a description of the tobacco* leaf which, although I am not entirely familiar with the subject, I think is fair, and therefore I will accept it."

This proposed amendment was a substitute for the clause, above quoted, as reported from Committee of the Whole, and was *in the precise terms of the present law*, for, after considerable discussion, it was fully adopted.

14 Cong. Rec., Part 3, *supra*, p. 2568.

In the debate (14 Cong. Rec., pp. 2564–2568, *supra*) Senator PLATT said of this amendment, now the law:

> "I know it is satisfactory to the cigar manufacturers, and I believe it will be to the tobacco growers."

Senator JONES, of Florida, said:

> "I am satisfied with it. I *realized, when we were in committee, how difficult it was to incorporate a provision* into the bill, which would *exclude Sumatra tobacco without excluding Havana tobacco*. I think this amendment will obviate that difficulty."

Senator SHERMAN, however, doubted if the standard fixed would operate successfully in practice, and anticipated just what has actually happened in the administration of the law—the discovery that importers had succeeded in avoiding the standard fixed by the act, without impairing or injuring their importations as a whole. He said:

> "I doubt very much whether that will accomplish the purpose, and yet I do not know anything

about it. I think I know enough about the devious ways of importers of other things, and of tobacco as well, to say how that will be ridden over and avoided as readily as you can avoid anything. In the first place, it requires a weight which is peculiar, all that one would have to do would be to *introduce* enough Sumatra tobacco, *weighing a different weight, or having a different quality, or something of that kind, so as to make it fall without the description of this particular tobacco.*"

This last amendment (the present law), it will be noticed, evidently was intended to get over the difficulty in the bill as reported from the Committee of the Whole, which provided, as a standard—

> "the *greater portion* of the box, bale or other package."

This would have excluded Havana tobacco. Therefore, instead of "*the greater portion*," the Senate adopted *eighty-five per cent.* of the leaf tobacco, in connection with a required weight for a hundred leaves, as the standard.

The amendment was prepared by a *tobacco dealer*, and was not as carefully drawn as it might have been (as Senator SHERMAN felt), and yet there is nowhere manifested any intention to alter the *unit* from which the 85 per cent. is to be computed. It was *only intended to raise the standard* from the "*greater portion* of the box, bale or other package," in the bill as reported, *to eighty-five per cent. thereof*, in which case, if up to that standard, the *whole* box, bale, &c., is dutiable at the higher rate. In the amendment as adopted, *in the anxiety to make the standard sufficiently high*, the framers of the law neglected *the details* so carefully provided for in the bill reported by the committee, and, as a consequence, we find no express reference to the bale, box, or package. The intention of Congress, however, appears clearly enough. A unit (the bale, box or package) had been fixed, and the only change which it was intended to effect by the amendment was in the *portion* of that unit (the bale) which should be de-

termined upon as the standard, the bill making it "the *greater portion*" and the amendment as adopted making it *eighty-five per cent.*

Still further light is furnished us by other provisions of the Revised Statutes on the general subject of appraisal and the levying of duty on imports.

Section 2901 is the section *providing for examination and appraisement*, and it declares that—

> "The Collector shall designate on the invoice at least one *package* of every invoice, and one package at least of every ten *packages* of merchandise * * * to be *opened, examined* and *appraised.*"

That being the procedure which is followed in these cases, the Act of March 3, 1883, *having been passed in view of that prescribed course* of procedure and practice, must be construed in harmony with the system then prevailing; and it therefore follows that, in making the examination and appraisal of a given "*package*" *of tobacco*, the appraisers must and will (as they have done) naturally apply the 85 per cent. standard to that "*package*" *as a whole and as the unit* referred to and established by the statute. In other words, section 2901 of the Revised Statutes, explains and relieves whatever doubt there might otherwise be in the Act of 1883. It supplies the details which are lacking in that Act, and, when read with it, makes a perfect system for the appraisal of "leaf tobacco."

That this *rule of appraisement* established by the Revised Statutes is *general*, and is to be applied to all parts of the various statutes constituting our system of tariff legislation, can hardly be disputed.

This Court has said:

> "It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it in any of its details, or prescribing new duties in lieu of existing

ones on particular articles. *The whole system* must be regarded in each alteration, and *no disturbance allowed of existing legislative rules of general application* beyond the clear intention of Congress."

Saxonville Mills v. *Russell*, 116 U. S., 13, at p. 21.

In the light of this provision in section 2901 of the Revised Statutes, these latter considerations alone are sufficient to demonstrate the soundness of the position of the plaintiffs in error.

Indeed, wherever it becomes necessary in the Revised Statutes to adopt or refer to a unit of quantity, the *bale or package* is made that unit. This is true when provision is made for the importation of different qualities of wool. The different qualities are to be ascertained in *each* "*bale, bag, or package*," and *it* is to be appraised accordingly.

R. S., §§ 2911–2912.

So in the case of sugar, samples are, under proper regulations, to be taken from the "*packages* of sugar."

R. S., § 2915.

So it is provided that a separate entry may be made of one or more "*packages*" contained in an importation of "*packed packages.*"

19 Sts., 49.
R. S. (Second Ed., 1878), p. 550.

In short, commercial usage, the practice of the customs officials, and the language of all statutes constituting a part of the same system, all point to the *bale* or package as the only unit upon which to estimate this 85 per cent., the whole bale or package to be rated and appraised accordingly.

In recognition of this usage and practice, and as a most important further legislative declaration of intention, refer-

ence may be made to the Tariff Law of 1890, approved October 1, 1890. Paragraph 242 of that act reads as follows:

> "*Leaf tobacco* suitable for cigar-wrappers, if not stemmed, two dollars per pound; if stemmed, two dollars and seventy-five cents per pound: *Provided*, that *if any portion* of any tobacco imported *in any bale, box or package, or in bulk*, shall be suitable for cigar-wrappers, *the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable;* if not stemmed, at two dollars per pounds; if stemmed, at two dollars and seventy-five cents per pound."

This act was framed and passed while the case at bar was pending in this Court, and, indeed, after all the briefs in the case had been filed with the Clerk, and while they were in the possession of the Government Departments. We therefore have in this recent statute a legislative declaration which, so far as this particular question is concerned, must be deemed to be of a very suggestive, if not conclusive, character.

The bale, box or package has always been the unit in practice; is declared, generally, to be the unit in the Revised Statutes—is in fact the only possible unit in appraisements—was recognized as the unit in the Tariff Bill of 1883; only failed to be expressly declared as the unit in the Act of 1883, as passed, owing to the adoption of the clause as carelessly framed by an ignorant layman who was merely a tobacco manufacturer; and *has now been expressly declared by Congress to be the unit* in all cases of this character.

It has been said, however, but in quite another connection, that each *invoice* or entry is a separate transaction for purposes of appraisement.

Sampson v. *Peaslee*, 20 How., 571, 580.

That decision is not applicable here, for it was there held simply that two or more separate invoices could not be put together for the purpose of reaching an aggregate value, which should not be exceeded by the prescribed

ten per cent. upon the appraisement, although one of the invoices, taken alone, would be so exceeded.

Nevertheless, even if the contention should be made and sustained that the 85 per cent. clause referred to the whole importation or invoice, appraised as a whole, it would not be material, or bar a recovery, so far as this case is concerned. Here, it must be borne in mind, *both the invoice* or importation, *as a whole, and each individual bale, contained less than eighty-five per cent.* of tobacco suitable for wrappers, within the prescribed standard. It is, therefore, in this respect, a wholly indifferent matter to us, which construction shall be adopted. Whether the bale or the invoice be taken as a unit, this particular importation must be classed and rated at thirty-five cents, for the "leaf tobacco"—the "article imported," the importation—must be one thing or the other, for purposes of appraisement. It cannot be both. *Unless* eighty-five per cent. of *it* (eighty-five per cent. "*of which*," the statute says) is of the superior grade, then *it*—the "leaf tobacco" imported—must be rated at thirty-five cents. Such is the plain reading of the statute.

It has also been suggested, and we shall have occasion to refer to the matter again, that the individual leaf can and should be taken as a unit. This means that each leaf is to be examined (or at any rate representative leaves) and a determination made as to whether or not 85 per cent. of *each leaf* is of the requisite fineness, and *of such weight* that more than 100 of such leaves would be required to weigh a pound. In fact, this is the latest (August 1, 1887) Treasury Decision on the subject (See Decision 8,368 at end of this brief).

In the first place, it is a well-settled principle, that a sensible and practical construction must be given to all statutes, and that any construction which will lead to absurd or unjust consequences, or which will render the statute oppressive in practice, must be avoided and rejected.

U. S. v. *Kirby*, 7 Wall., 482, 486–487.

It is an undisputed fact upon this record that the leaf cannot in practice be adopted as a unit. It is not practical to separate the hands of tobacco. It destroys the package, and is, altogether, a practical impossibility (Rec., p. 20-24; 29 bot.; 30). Besides, the only way of determining what is *really* suitable for wrappers is to put the leaf through the wetting and other processes of the cigar manufacturer (Rec., p. 18). Of course, Congress did not expect the Government to do that. In short, the Government appraiser tells us in this case that, without a slip of paper like that employed to separate the different grades of tobacco in this Falk importation, it would be practically impossible to make the required separation (Rec., pp. 23-24). This is all testimony as to the *practical operation* of this act by an expert who has tested its operation. It is not theory.

But, in truth, there is no justification whatsoever, on the face of the act or elsewhere, for this suggestion of the single leaf as a unit upon which to compute the eighty-five per cent. Upon this point, the terms of the act are plain. It refers to—

> "Leaf tobacco * * * *of which* more than one hundred *leaves* are required to weigh a pound."

The object aimed at is some *gross amount of "leaf tobacco,"* because the act contemplates a *weighing of more than* 100 *leaves* of *that* very *leaf tobacco*. It must require more than 100 "*leaves*" *of this* "*leaf tobacco*" to weigh a pound, and 85 per cent. *of this same* "*leaf tobacco*"—*not of each leaf* thereof—must be of the requisite fineness, in order to bring it up to the seventy-five cents grade. Nothing is contained in the act which could possibly be tortured into a suggestion that an individual leaf was intended to be used as a unit. The *article* which is levied upon at seventy-five cents is the *article imported*, that is, "leaf tobacco"—*not* A *leaf* OF tobacco—"*of which*" eighty-five per cent. is suitable for wrappers, and more than 100 "*leaves*" "*of which*" are required to weigh a pound. The act speaks of leaf tobacco suitable for

"*wrappers*," not of *a leaf* of tobacco, suitable for *a wrapper*.

The whole paragraph points with reasonable certainty to the *importation or invoice* of leaf tobacco—the article imported—*in gross* and as a whole, as that upon which the duty is to be levied, as in the ordinary course of things, the method of appraisal to be *bale by bale*.

In Treasury Decision 8,368 (at end of this brief) it is said:

> "*Every leaf* eighty-five per cent. *of which* is suitable for wrappers and the weight *of which* is *such* that more than 100 *such leaves* would be required to weigh a pound, is declared to be liable to the high rate of duty."

With all due respect, we say that this is an utter perversion of the language of the act. The statute says nothing about "*every leaf*." It says nothing about the weight of "*a leaf*" being "*such*" that more than 100 "*such*" leaves are required to weigh a pound. Merchants do not import *a* "*leaf*" of tobacco, and, prior to this last utterance of the Department, nobody ever heard of an attempt to impose a duty upon *a leaf* of tobacco. Merchants, however, do import "*leaf tobacco*." That is their invoice, their importation, and, as such, it becomes the "article imported," upon which alone a duty is imposed by section 2502 of the Revised Statutes, as amended by the Act of 1883. The strained and unreasonable character of this latest attempt at construction by the Treasury Department is emphasized by their further statement, that this view which they have adopted as to each and every leaf as a unit is—

> "strengthened by the provision in the paragraph that, in determining the weight, *individual leaves* alone are to be regarded."

To this suggestion, like the first, it is a sufficient answer to say that the act contains *no such provision*. The individual leaf is not mentioned, nor is the slightest reference made to it in any way. This whole construction is

based on an absolute *misreading* of the statute. It really makes a new statute. Nevertheless, it does exhibit very satisfactorily the straits to which such an attempt at a forced construction can lead one.

A large part of the embarrassment in the construction of this act is due, in our opinion, to a failure to pay proper attention to the real article which is taxed. Section 2502 of the Revised Statute, as amended, as we have repeatedly said, imposes a duty on "all *articles imported*," which are "*mentioned*" in the schedules. And, as one of the "articles imported" so "mentioned," we find "*leaf tobacco*" in Schedule F—*not a leaf of* tobacco, but an *article* or importation described as "*leaf tobacco.*"

A strained and unnatural construction is to be avoided, and, as Mr. Justice STORY says of tariff acts in general:

> "We are not to strain them to reach cases not within their terms, even if we might conjecture that public policy might have reached those cases." *U. S.* v. *Breed*, 1 Sumner, 159, 160.

There is, therefore, nothing worthy of serious consideration in this suggestion of the individual leaf as a unit.

This brings us to a more detailed, but brief, consideration of the various constructions placed upon the Act of 1883 by the Treasury Department, officials, and courts. For convenience, we have printed all of these decisions at the end of this brief.

In Decision No. 5,715, announced May 18, 1883, it was stated definitely:

> "The Department decides that the limitation of 85 per cent. refers to *each package*, and not to each invoice."

This decision was confirmed by the letter of the Department to the Collector at New York, under date of November 10, 1883, (printed at end of brief) in reference to

the first importation of ten bales by these plaintiffs, packed precisely like those in the present importation.

The Department then said:

> "The law *does not specify how tobacco shall be packed, nor is there any limitation on the manner of its packing.* None of the bales in question, as imported, contained, it is understood, 85 per cent. of leaf tobacco of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and if so, *none of it is dutiable under the provision of law referred to.*
>
> "*If there is 85 per cent. or over* of leaf tobacco in *any bale*, suitable for wrappers, *the whole of such bale is dutiable* under paragraph 246."

On May 1, 1884, however, in Decision No. 6324, in accordance with an opinion of the Attorney-General which is there incorporated, the Department *reversed* itself, on the appeal in the case of the very importation here in question, and held that the *bales might be divided* and broken up, and the superior wrapper tobacco appraised at 75 cents and the inferior tobacco at 35 cents, which was in fact done in the present case. The chief reason given for this decision is found in the statement of the Attorney-General, that the act nowhere refers to bales or packages, and that "upon the face of the provision"—

> "*The duty will attach to tobacco of the statutory description* therein given, no matter what may be the *vehicle* in which that tobacco is imported."

Here again there is the same failure to regard the real "article imported." The Attorney-General really assumes the whole question. What is the real "*tobacco* of the statutory description," to which he refers? It is the "*leaf tobacco*" in question. *It* is dutiable, *so the statute declares*, at thirty-five cents, *unless it* is of the required fineness and weight, in which case *it*—as the "article imported"—becomes dutiable at the higher rate. The only question is, as to how *the article imported* shall be classified. *It* must be in one class or the other. *There is*

nowhere any authority for subdividing it. That involves reading into the statute an entirely new and foreign provision. Congress alone can accomplish that.

Bearing in mind that, in this last decision, in accordance with the ruling of the Attorney-General, it was held that the *bales might be broken up*, and the different grades sorted out, and each grade rated in its appropriate class, we find the Department holding, in decision No. 6874, on December 10, 1884, that, even though a part of an importation consisted of the 75 cents grade, yet as it did *not*, in each instance, *amount to* 85 *per cent. of a bale*, all of the tobacco being of the wrapper class, so-called, the *whole bale* must nevertheless be held as dutiable at 35 cents. This was directly opposed to the Attorney-General's ruling, and was a return to the original decision (No. 5715). No distinction between the cases can be drawn on the ground that in this last instance the tobacco was all suitable for wrappers, although most of it was of a kind that would require less than 100 leaves to weigh a pound, because the statute makes *no distinction* between a so-called 85 per cent. grade, described as suitable for wrappers, and a grade requiring more than 100 leaves to weigh a pound. It is *all the same grade*, dutiable at 75 cents. The statute, so far as we are here concerned, makes *but two classes* of leaf tobacco. The first must consist of tobacco, 85 per cent. of which is of the necessary fineness to be suitable for wrappers, "*and* of which more than one hundred leaves are required to weigh a pound." That is *all one class*, and cannot be subdivided. The second class consists of "*all other* tobacco in leaf."

Next in point of time came the decision of the United States Circuit Court for the Southern District of New York, on a former trial of this very case, or of another of the same group of cases, involving the same class of importations. Judge WHEELER there held (*Falk* v. *Robertson*, 25 Fed. Rep., 897, 898, December 29, 1885; also printed at end of this brief) that the statute—

> "appears to be intended to apply to *any distinct quantity* of the requisite qualities *which should be imported.*"

This was plainly a return to the rule established by the Attorney General and to the Department decision (No. 6324, May 1, 1884) based thereon. At this point of time, therefore, we have three decisions (including the letter of November 10, 1883) in favor of the integrity of the bale as a unit, and two decisions in favor of breaking up the bale and separating and appraising whatever quantities of the respective classes of tobacco may be found therein.

Following this decision, the Department proceeded (Decision No. 7350, February 3, 1886) to correct, in accordance therewith, the practice which had been adopted by the Collector of New York, and to instruct him that thereafter he must break up the bales, and appraise each class separately, levying the proper duty upon whatever quantity of each class—75 cents or 35 cents grade—might be found in the invoice. This was to be accomplished by an actual assortment of "hands" of the tobacco in at least one bale in ten in each invoice, and the Department ruled that—

> "The proportion of each sort so ascertained shall determine the proportionate parts of the whole invoice for the purpose of classification at the different rates of duty."

This last decision, in the method of examination proposed, proved (as the testimony of the appraiser in this case would have led us to suppose) destructive to the merchandise, and therefore not practical, and accordingly, on June 20, 1887, in decision No. 8299, the Department instructed the Collector at New York that, agreeably to a suggestion by the appraiser, not less than *ten* representative "*hands*" should be drawn from each representative bale, for purposes of examination, in determining the proportions of fine, and light and heavy leaves in an invoice.

Then followed the final decision, No. 8368, of August 1, 1887, upon which we have already commented. That decision indicated an entirely new departure by the Treasury Department, in attempting to impose a duty on—

"*Every leaf*, 85 per cent. *of which* is suitable for wrappers, and the weight *of which* is *such* that more than one hundred of *such* leaves would be required to weigh a pound."

This decision is extraordinary in its terms, and *strains* after an interpretation which violates every canon of construction and every known commercial and official usage and practice. Not only so, but, upon the undisputed testimony of the appraiser in this case, the decision leads to an absurdity in practice, inasmuch as the construction and method of appraisement which it proposes, involving an examination, no matter how general, of *individual leaves* in the "hands" and bales, *cannot possibly be applied in practice*. It is utterly *impracticable* to make *such* a separation of the different kinds of tobacco. This general question we have heretofore discussed.

This remarkable decision contains a declaration that "the decisions heretofore rendered upon the the same subject," "*are modified so far as they may be in conflict herewith*," and the Department "*declines to issue any other or further instructions* upon the subject." It therefore regards this decision as final.

Thus we are furnished with a series of *nine* elaborate decisions (including those of the Attorney-General and of Judge WHEELER), all more or less at war with one another. Decisions 5715, 6674, and the decision contained in the Department's letter of Nov. 10, 1883, are founded on good sense and on commercial and official practice and usage. All of the others, as it seems to us, are unjustifiable. These latter decisions all fail to recognize, as we have repeatedly pointed out, the real "*article imported*" upon which alone, and as a whole, duty is imposed. We call particular attention to the very sensible letter of Judge ROBERTSON, when Collector at New York, under date of November 7, 1883, and the equally sensible reply thereto of the Treasury Department, under date of November 10, 1883. (Both of these letters are printed at the end of the brief.) They plainly exhibit the only prac-

tical and reasonable construction which can be given to this act.

As a *whole*, of course this group of decisions, owing to their inconsistency, cannot be accorded any weight in this Court, as establishing either a uniform official usage or an official construction, which, under different circumstances, might be received as an aid in construing the act.

In the construction of this act, it should be borne in mind that regulations of the Secretary of the Treasury *cannot alter or amend the law.*

Morrill v. *Jones*, 106 U. S., 466.

If *Congress* is not satisfied with the standard it has adopted for the appraisement of leaf tobacco, *it* may prescribe a new one.

> "If it be found by experience that the standard is a fallacious one, can the Executive Department supply defects of legislation? Congress alone has the authority to levy duties. Its will alone is to be sought."
>
> *Merritt* v. *Welsh*, 104 U. S., 694, at p. 700.

And as to the standard fixed for sugar, this Court, in the case last cited, said, with unmistakable emphasis:

> "If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the Custom House to follow. As before said, Congress alone has the power to levy taxes and duties."
>
> 104 U. S., at p. 701.

Finally, disregarding the individual leaf as an absurd unit of appraisement, it is, as we have said, an indifferent matter to us whether the bale as a whole, or the invoice as a whole, be accepted as the practical unit for *appraisement* of the importation, with reference to the percentage

of superior tobacco. In either case, this judgment must be reversed, for neither 85 per cent. of any of these bales nor 85 per cent. of the entire invoice possessed the required qualities belonging to the 75 cents grade. All of this tobacco was therefore dutiable at 85 cents a pound.

Second Point.

In the construction of this statute, and in applying it to the present importation of leaf tobacco, the fact that the bales in question were repacked in Holland, and that they contained some leaf tobacco, not suitable for wrappers, is wholly immaterial. There can be no pretence that there was any fraudulent evasion on the part of these plaintiffs in error.

The argument on the part of the Government is largely based on this fact, that the bales were repacked in Holland so as to contain less than 85 per cent. of the superior grade of tobacco, and this process is described as a "trick" and the bales are referred to as "fraudulent bales" and as "dishonest, made-up bales." Nothing could be farther from the truth than such a description of this process and of these bales, and at the very outset we wish strenuously to protest against such unjustifiable characterizations. They find no support in this case, and are wholly inapplicable to the conduct of these plaintiffs in error.

The Government is not concerned with, and cannot consider, the form or character of merchandise, or any changes which have taken place therein, prior to its importation, provided the article is freely exposed for examination, is really what it is stated to be in the invoice, and is not a fraudulent cover for an article dutiable at a higher rate.

The only question which the Government can ask is, "What *is* the *article imported?*" *not*, What *has it been?*

In this case the "article imported," as we have stated numberless times, was *all* "*leaf tobacco*," in bales. *It* was dutiable at 35 cents, *unless it* proved on examination to be of a superior statutory grade. It was freely exposed to the appraisers—had in fact been *packed at the suggestion of the Government*, with a slip of paper separating the different qualities of tobacco--and it was found that both the invoice or importation, as a whole, and each bale thereof, belonged to the inferior grade, inasmuch as the invoice, as well as each bale, contained only about 83 per cent. of the superior leaf tobacco, and fully 17 per cent. of tobacco not suitable for wrappers. Nevertheless, the bales were subdivided, and both grades were assessed at the different rates.

Such was the nature of this importation, this article imported, and we contend that, so long as there was no doubt that it was all "leaf tobacco," as it was invoiced and purported to be, that was as far as the Government or the Courts could go, and that it was immaterial to inquire, and nobody was justified in inquiring into the manner in which the article had been packed for importation, or as to anything which had happened prior or subsequent to its actual importation into this country.

The Act of 1883 says nothing about the packing of the tobacco. The merchant may arrange that as he chooses. In this particular case, *the Government itself suggested* that it should be packed as it was in fact packed, thus showing perfect knowledge of the facts on its part. And yet this method of packing, the fact that the bales had been repacked in Holland and a proportion of inferior leaf tobacco introduced into each bale, has been relied upon by the Government and the courts to justify a subdivision and breaking up of the bales and the invoice, and a separation and appraisement of the different grades of tobacco in each importation, at the two different rates of duty. For instance, in *Falk* v. *Robertson*, 25 Fed. Rep., 897, 898

(printed at end of this brief), the Court said of these very importations, in granting a motion for a new trial, after having directed a verdict for the plaintiffs:

> "Upon further consideration of the subject, on a motion for a new trial, it now seems that sufficient attention was not given to the *composition of the bales*. The quality and standard of the superior grade were not changed by binding the inferior grade in a separable manner with it into a bale. A distinct quantity of the superior quality, subject to the higher rate, was imported with each of the bales."

Again:

> "Here *the article* was sought to be reduced by association with *another article, during importation*, and to be restored afterwards. But the association did not reduce or affect it.

The learned judge has here overlooked the distinction between the real "*article imported*," namely, the whole of this "leaf tobacco," which is, *as a whole*, the only thing dutiable under the statute (R. S., § 2502), and the *proportions* of the *superior and inferior grades* of tobacco in *that article*, which must lead to *its appraisement* (by the *bale*, as we claim) at one rate or the other.

What the learned judge means by "association with *another article during importation*," it is difficult to determine, when the expression is applied to this case. There is *no such thing as* "*another article*." It is *all one* article—"*leaf tobacco*"—the article "mentioned" (R. S., § 2502.) in the schedule. There has been no association "*during importation*," for that means during the act of entry at a port of the United States. At that time nothing was done to this merchandise, and the Court certainly cannot go behind that point of time. But, as we have said, even if it could, nothing could come out of its investigations.

We have here a statute which says nothing about pack-

ing or packages, and we find importers packing their merchandise to suit themselves, with a result that *it*—the article imported—comes in at a lower rate of duty. What of it? The Government knows about it, suggests a method of packing with a slip of paper, and there is the utmost good faith throughout the transaction. *Congress* has taken no steps to restrict or prescribe the method of packing "leaf tobacco," although, as we have seen, Senator SHERMAN anticipated what has actually happened, and, during the passage of the act, called to the attention of the Senate the fact that importers, as he believed, would, by some method of packing, be able readily to *avoid* the standards fixed by the act, as at present framed. Nevertheless, turning a deaf ear to this warning, *Congress* has only taxed the leaf tobacco—the article imported—as it finds it at the time of importation.

As Judge ROBERTSON said in his letter of November 7, 1883, to the Department, in reference to this very importation:

> "There is *no law which requires that an importer shall have in an importation* 85 *per cent. of a specified quality*, and consequently it is, in my judgment, *quite competent for him to have his tobacco so packed or repacked* that it might escape the highest rates of duty. The law-makers have fixed a standard which may be defective."

And in its reply of November 10th, 1883, the Treasury Department acquiesced in these views, as we have seen, saying:

> "*The law does not specify how tobacco shall be packed—nor is there any limitation on the manner of its packing. None* of the bales in question, *as imported*, contained, it is understood, 85 per cent. of leaf tobacco, of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and, if so, *none* of it is dutiable under the provision of law referred to.

"*If there is* 85 per cent. or over of leaf tobacco *in any bale* suitable for wrappers, the *whole of such bale* is dutiable under paragraph 246."

It begs the whole question to assume that this repacking process really results in a practical avoidance or evasion of a higher rate. The point is just this—Congress has seen fit to lay a *discriminating* duty on leaf tobacco of a *given standard*, and if the tobacco, *as imported*, fails to come up to that standard, you cannot, by any sort of legal legerdemain, still impose the higher duty upon any part of that importation. It is the importation, the article imported, which Congress has alone considered; and it has declared that 85 per cent. of *it* must be of the superior grade before it can be assessed at 75 cents a pound. If the importer so changes the form of his importation as to bring in his article at the lower rate, that is nobody's concern but his own, so long as he is guilty of no fraudulent evasion.

And the same considerations serve to answer the suggestions that are drawn out by the fact that, in some instances, *after importation*, the plaintiffs have sold separately the inferior and superior tobacco in a bale. That has nothing to do with the quality or condition of the article imported, or with the application of the prescribed statutory standard of discrimination. That fact cannot concern the Government, nor has it anything more to do with the determination and levying of the proper duty upon the original article, as imported, than the constitutional power of Congress, to regulate commerce, has to do with the disposition and taxation of imports, when and after they have passed out of the original packages.

This question is really disposed of by authority.

In a case where British loaf-sugar had been *crushed or powdered*, and *imported in that powdered state*, where a high and discriminating duty was, in fact, laid by statute

upon all *loaf sugar*, a much lower rate being imposed on *powdered sugar*, Mr. Justice STORY said, and his language finds a precise application in the case at bar:

> "Here the duty, is not laid merely on *sugar*, which is the generic name; but a *discriminating duty* is laid upon sugar of certain colors, *in a certain state, or having a particular denomination or a particular form.*"

And again:

> "Here the article is in a state such as may be *dutiable* by law, under a particular description. *Its form is precisely that indicated by law.* And it is *assuming the whole question to say that the change of form is an evasion* of the act, much more that it is a fraudulent evasion. If the *Legislature* has made the *form* or descriptive appellation the *basis* of the *discriminating* duty, then *the change of form to meet the discrimination is no evasion and no fraud. The act gives the election to the party, and he has the right to make it. He does that which the law allows, in the very manner and with the very design it allows.*"

To constitute a fraudulent evasion of a revenue law, the learned Judge further said:

> "There must be substantially an introduction of *the very thing taxed, under a false* denomination or cover, with the intent to evade or defraud the act."

Accordingly, he held that the sugar was *not* dutiable as *loaf sugar* under the statute, "for it *wants the form.*" "*It is not in loaves.*"

U. S. v. *Breed*, 1 Sumner, 159, at pp. 165 and 166.

That is precisely what this Court held in a similar case, where, to avoid the *high* rate of duty on *sugar* and secure the

low rate on *syrup*, genuine refined sugar had been *dissolved* in water, and imported in that state. It was held *not* dutiable *as sugar*, but as *syrup*, according to its then form, and this, in the face of the fact that the claimant had an *establishment* at Matanzas *for preparing sugar in just this way* for shipment to New Orleans, where it was re-refined in his refinery at that place.

U. S. v. 112 *Casks of Sugar*, 8 Pet., 277, 280.

In a recent case where it was assumed that a *low grade of color* had been given to a *superior* grade of sugar, in order to secure a *lower rate* of duty under the Dutch color standard adopted by Congress, this Court said:

> "Great stress is laid on the charge that sugars are *manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the Government.*"

And again:

> "*It may be* that our tariff of duties is *evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties*, provided he can do it without injuring their marketability, or injuring it less than the duties involved. *So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred.*"
>
> *Merritt* v. *Welsh*, 104 U. S., 694, at pp. 701 and 704.

Inasmuch as this avoidance of high duties is perfectly legitimate, as practiced by the merchants in this case, the remedy for the defect in the law, if any, rests with *Congress*, and not with the courts or the executive departments. As this Court said in the case last cited:

> "If it be found by experience that the standard is a fallacious one, can the executive department supply the defects of legislation? *Congress alone* has the authority to levy duties. *Its will alone is to be sought.*"
>
> 104 U. S., at pp. 700–701.

Mr. Justice STORY said, in a similar case, to which we have already referred:

> "It is *a misfortune incident to all laws, that they are necessarily imperfect*, and from human infirmity fall short of all the intended objects. But in all such cases it is the *business of legislation, and not of courts of justice, to correct the evil. We* are to *administer* the laws, and *not* to *make* them."
>
> *U. S.* v. *Breed*, 1 Sumner, at p. 167.

It is also true, that a *court* will not seek to *spell out* of a statute, clearly expressed as far as it goes, a provision to correct a defect or evil arising in its practical administration. Nor will the *court* adopt a forced construction, and so, in effect, usurp the exclusive power and authority of *Congress*. This Court has clearly expressed this principle in *Merritt* v. *Welsh*, *supra*. It was there said:

> It is *better to submit to a temporary inconvenience than to set the laws all afloat* by laying down a canon of construction which leaves the plain words and seeks to *spell out*, or *guess at*, the supposed intent of the Legislature, *contrary or supplementary to that which is clearly embodied in the words it has used*" (104 U. S., at p. 702–703).

And again:

> "*A better remedy than that of making a forced construction* of the law is in the *power of Congress*. All that has to be done is to *change the law so as to reach the goods in their new form, if it is thought desirable to do so.*"
>
> *Merritt* v. *Welsh*, 104 U. S., 694, at p. 705.

Nothing could be more emphatically applicable to the case at bar than these recent expressions of this Court. They really leave nothing more to be said. This tobacco is all "leaf tobacco"—the "article imported." *Its* changed quality or "new form," however, subjects it only to the lower rate of duty. *Congress* must provide the remedy, if any remedy is called for or desired, to reach this changed condition.

Finally, it goes almost without saying, in view of the preceding statement of facts, that there was no attempted fraudulent evasion of duty in this case. The Government was *conferred with at every* step; it was *advised* of the *test importation* of ten bales, when these very questions were decided in *plaintiffs' favor*; it was fully *advised of the character of the present importation*; and, in reference to similar importations, it *suggested a form of packing* the tobacco by which a slip of paper should be made to separate the different qualities or grades. Everything was open; nothing was concealed. The correspondence in the case between the plaintiffs and the Government is alone sufficient to show the entire good faith of the plaintiffs. But we need not rest upon that, for we have a judicial declaration of their good faith. In *Falk* v. *Robertson*, 35 Fed. Rep., 897, 898, the Court, while deciding against the plaintiffs in reference to this very importation, and on the very ground that they had introduced inferior leaf tobacco into the bales in order to lower the quality of the whole of each bale and of the invoice, said:

> "*Justice to the plaintiffs*, however, *requires that they should be entirely acquitted of any attempt to*

deceive the customs officers by what they did; for it was *done with their full knowledge, and partly at their suggestion, and after a like importation*, with the *full knowledge of all*, had been *passed, as a test case, at the lower rate.* Still the Department is not estopped, nor claimed to be, from changing its decision, *although it may work a hardship.*"

The plaintiffs have, therefore, been fully vindicated and justified in the course which they have adopted and pursued in the matter of these importations.

Third Point.

The judgment below should be reversed and the case remanded for a new trial.

JOSEPH H. CHOATE,
CHARLES C. BEAMAN,
Of Counsel.

October, 1890.

APPENDIX.

CUSTOM HOUSE, NEW YORK.
COLLECTOR'S OFFICE,
Nov. 7, 1883.

SIR:

I have the honor to acknowledge the receipt of your letter of the 31st ultimo (H. B. J.), enclosing one from Messrs. G. Falk & Brother, relating to the classification for duty of certain Sumatra tobacco. Your correspondents entered for warehousing on the 24th of September last, an invoice of ten bales Sumatra tobacco at an estimated duty of thirty-five cents per pound, the same having been imported by them per steamer *Amsterdam*. Entry number, 125,568.

The appraiser made return on the invoice as follows: "10 bales leaf tobacco, 75 cents; net weight, 1,660 pounds; not stemmed, suitable for wrappers, under paragraph 660, Morgan. Also 35 cents, 440 pounds net, paragraph 661, Morgan."

This department first called upon the appraiser to report whether his return was made in view of the department decision of May 18, 1883 (S. S. 5715), *i. e.*: "Is 85 per cent. of each package of requisite size and fineness for wrappers?" and that official replied, "That the return was made in view of department decision May 18, 1883 (S. S. 5715), as explained in the appraiser's letter of this date, October 27, 1883."

The letter of the appraiser referred to is herewith transmitted, by which it appears that in each bale was "a quantity of very inferior leaf tobacco, probably not the product of Sumatra, fit for use only as fillers, which had undoubtedly been put in by a repacking process, resorted to, no doubt, at Amsterdam, and that the effect of this arrangement was to reduce the quantity of the large leaf in each bale or package to less than eighty-five per cent. in order that the same might not be made liable to the pro-

visions of Schedule F of the Tariff, which declares as follows: 'Leaf tobacco, of which 85 per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, $1 per pound.'"

If the law as construed in your decision of the 18th of May last (S. S. 5715) imposes duties at 75 cents or $1 per pound on leaf tobacco only in cases where 85 per cent. of each package of tobacco is of requisite size and fineness for wrappers, then packages containing less than that quantity of such tobacco are not, it seems to me, liable to those rates of duty. The appraiser speaks of an "intent to avoid the law," but there is no law which requires that an importer shall have in an importation 85 per cent. of a specified quality, and consequently it is, in my judgment, quite competent for him to have his tobacco so packed or repacked that it might escape the highest rates of duty.

The lawmakers have fixed a standard which may be defective. In the language of the United States Supreme Court, in the case of Welsh *vs.* Merritt (S. S. 5154), "If it be found by experience that the standard is a fallacious one, can the Executive Department supply the defects of legislation? Congress alone has the authority to do this, and its will alone is to be sought. If Congress, as it has done, adopt the standard, it is not for the Custom House Department to adopt a different one. When Congress chooses to do this, it will be time enough for the Custom House to follow."

The entry has not yet been liquidated, and as no appeal to you could follow from the assessment of duties in accordance with my construction of the law and your interpretation thereof, I submit the views of the appraiser, and beg to await such instructions as to you shall seem called for.

I return the enclosure of your letter.

Yours, very respectfully,

W. H. ROBERTSON,
Collector.

Hon. CHARLES J. FOLGER,
Secretary of the Treasury.

CUSTOM HOUSE, NEW YORK CITY.
COLLECTOR'S OFFICE,
TREASURY DEPARTMENT,

November 10, 1883.

COLLECTOR OF CUSTOMS,
New York.

SIR:

The department is in receipt of your letter of the 7th instant, relative to the classification of leaf tobacco imported by G. Falk & Bro., and enclosing a report from the Appraiser on the subject.

Schedule F, of the tariff of March 3, 1883, paragraph 246, contains the following provision: "Leaf tobacco of "which eighty-five per cent. is of the requisite size, and "of the necessary fineness of texture to be suitable for "wrappers, and of which more than one hundred leaves "are required to weigh a pound—seventy-five cents per "pound."

The importation of Messrs. Falk & Bro. comprised ten bales leaf tobacco, and on examination the bales were found to contain a considerable proportion of large leaf tobacco suitable for wrapping—generally known as Sumatra tobacco.

Surrounding the Sumatra tobacco, however, in each case was a quantity of inferior leaf tobacco, fit for use only as fillers, which the appraiser states "had undoubtedly been put in with each bale by a repacking process, resorted to, no doubt, at Amsterdam."

In view of this fact the appraiser regarded the Sumatra tobacco as being dutiable, separately, under the provision of law quoted, and the inferior tobacco to a duty of 35 cents a pound.

In decision 5715 of May 18, 1883, the question was presented whether the 85 % specified in the provision of law cited had reference to each package or to the whole invoice, and it was then decided that it had reference to each package.

The law does not specify how tobacco shall be packed—

nor is there any limitation on the manner of its packing. None of the bales in question, as imported, contained, it is understood, 85 % of leaf tobacco of the requisite size, and of the necessary fineness of texture to be suitable for wrappers, and if so, none of it is dutiable under the provision of law referred to.

If there is 85 % or over of leaf tobacco in any bale suitable for wrappers, the whole of such bale is dutiable under paragraph 246.

You will take action accordingly.

Very respectfully,

(Signed) H. F. FRENCH,
Acting Secretary.

H. B. J.
(No enclosure.)

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FALK *et al.*
v.
ROBERTSON.

(December 29, 1885.)
25 Fed. Rep., 897.

Charles C. Beaman, for Plaintiffs.
Samuel B. Clark, Assistant U. S. Attorney, for Defendant.

WHEELER, *J.*:

This suit is brought to recover back money paid for duties on leaf tobacco under Schedule F of the Act of 1883, which lays a duty on "leaf tobacco of which eighty-five per cent. is of the requisite size, and of the necessary fineness of texture, to be suitable for wrappers,

and of which more than one hundred leaves are required to weigh a pound—if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound" (22 St., 503). Upon the trial it appeared that leaf tobacco is usually dealt in at so much per pound by the bale; that none of the bales of the plaintiff's tobacco had 85 per cent. of them of the requisite size and fineness and weight to be suitable for wrappers; that it was not stemmed, and was assessed at 75 cents per pound against the protest of the plaintiffs that it be assessed at only 35 cents per pound. It further appeared that the plaintiffs had this tobacco in Holland, from whence it was imported in bales as it came from where it was raised, some of which were composed of tobacco more than 85 per cent. of which was of the size and texture to be suitable for wrappers, and of which more than one hundred leaves would be required to weigh a pound, and some of which were composed of tobacco of inferior quality; and that enough of that of inferior quality was put into bales with the other, with strips of paper or cloth to mark the extent of each, to make the bales imported, which were separted again after importation. A verdict was directed for the plaintiffs, upon the supposition that each bale, as a unit of quantity, however made up, was to be estimated in determining the rate per cent. of quality.

Upon further consideration of the subject on a motion for a new trial, it now seems that sufficient attention was not given to the composition of the bales. The quality and standard of the superior grade were not changed by binding the inferior grade in a separable manner with it into a bale. A distinct quantity of the superior quality, subject to the higher rate, was imported with each of the bales. It was the same where it came from, and all the way, and after its arrival. The act of Congress does not refer to any particular quantity as a basis for the 85 per cent. It appears to be intended to apply to any distinct quantity of the requisite qualities which should

be imported. This is different from the case supposed in argument, of cloth made within one of the number of threads to the inch at which the rate of duty would be changed. There an article was made on which a certain rate of duty would be imposed, and the article would always remain the same. Here the article was sought to be reduced by association with another article during importation, and to be restored afterwards. But the association did not reduce nor affect it.

Justice to the plaintiffs, however, requires that they be entirely acquitted of any attempt to deceive the customs officers by what they did; for it was done with their full knowledge, and partly at their suggestion, and after a like importation, with the full knowledge of all, had been passed, as a test case, at the lower rate. Still the department is not estopped, nor claimed to be, from changing its decision, although it may work a hardship.

Verdict set aside, and new trial granted.

TREASURY DECISIONS.

5715.

Leaf Tobacco.

TREASURY DEPARTMENT, May 18, 1883.

SIR:

The Department is in receipt of your letter of the 30th ultimo in relation to the proper construction of that portion of the new tariff (T. I. new, 246) taking effect on the first of July next, which is as follows: "Leaf tobacco of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers and of which more than one hundred leaves are required to weigh a pound if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound."

The question involved is, what is meant by 85 per cent.? Is it 85 per cent. of each package or 85 per cent. of the whole number of packages covered by one invoice?

The Department decides that the limitation of 85 per cent. refers to each package and not to each invoice.

Very respectfully,

H. F. FRENCH,

Assistant Secretary.

Collector of Customs, New York.

6324.

Leaf Tobacco—Classification of.

TREASURY DEPARTMENT, May 1, 1884.

SIR:

The department duly received your letter of March 28, 1884, reporting on the appeal (3330i) of G. Falk & Bro. from your assessment of duty at the rate of 75 cents per pound on certain leaf tobacco imported per "W. A. Scholten" from Amsterdam, January 24, 1884.

It is understood that certain bales of tobacco produced in Sumatra were shipped thence to Amsterdam. Leaf tobacco is put up generally in bundles called "hands." While the packages were in Holland, a certain portion of the bundles or hands originally contained therein were taken out and their place supplied by other bundles or hands of leaf tobacco, the portion of the original contents remaining in each bale amounting to 170 pounds, while the substituted portion amounted to 37 pounds to the bale. The 170 pounds belonged to the class known as wrapper tobacco, while the 37 pounds were not suitable for wrappers and did not belong to the class known as wrapper tobacco, so that that there was $82\frac{12}{100}$ per cent. of the bundles or hands in the package belonging to the class known as wrapper tobacco, and $17\frac{88}{100}$ per cent. of the bundles or hands in the package which belonged to a class of tobacco not suitable for wrappers.

Paragraphs 246 and 247 of the tariff of March 3, 1883, are as follows: "Leaf tobacco, of which eighty-five

per centum is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound."

In decision (Synopsis) 5715 the decision was discussed as to what unit of quantity the 85 per cent. specified in the law related to, and it was held that it referred to the package. The appellants claim that that inasmuch as no package of this importation contained 85 per cent. of leaf tobacco suitable for wrappers, therefore no part of the tobacco contained in the importation is liable to the duty of 75 cents per pound, but that all should be charged with a duty of 85 cents per pound.

Prior to the taking effect of the Act of March 3, 1883, the custom was to import wrapper tobacco by itself, unmixed with any portion of the class of tobacco which was not generally fit for wrappers. The view has been urged, therefore, that Congress, in imposing a duty of 75 cents per pound on leaf tobacco, 85 per cent. of which was fit for wrappers, had reference to the article as commonly imported, all of which, though belonging to the class of wrapper tobacco, might not be fit for wrappers, and which in some cases might not have therein 85 per cent. suitable for wrappers. The two classes of tobacco in this importation are in bundles, or hands, readily distinguishable from each other, and readily separable by any one having a knowledge of the different qualities of tobacco.

Briefs upon both sides of the question have been filed in this Department, and after a hearing upon the subject they were referred to the Attorney-General for his opinion. The following is his opinion upon the point thus presented:

"In yours of the 21st instant, my attention is called to a clause in Schedule F of the Act of 1883, ch. 121 (22 Stat. 502), which imposes 'duty on leaf tobacco.'

"Without asking a direct question thereupon, you state a *doubt*, from which I gather that you desire advice whether that clause regards a *bale* or *package* as the dutiable unit of such leaf tobacco; and, if so, whether there is enough upon the face of it to indicate that Congress intended to refer to that bale or package which was known to commerce in March, 1883, so that a subsequent change thereof, with a view to avoid the duty imposed, may be regarded as fraudulent, and therefore be met by such counteracting administrative methods as may be found practicable.

"The clause in question is as follows: 'Leaf tobacco, of which eighty-five per centum is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.'

"I observe that nothing is said in the act as to *packages* or *bales*, or any other merely *commercial* form in which the merchandise is imported. Wholly irrespective of such commercial form, the duty is levied directly upon the article rated by its qualities for certain sort of consumption, *i. e.*, into *wrappers*. A like remark is true of each of the seven paragraphs imposing duty upon tobacco.

"Upon the face of the provision, therefore, I submit that the duty will attach to tobacco of the statutory description therein given, no matter what be the *vehicle* in which that tobacco is imported.

"I submit further that such questions as arise touching the best way of administering the above statute, however important they may be practically, are at least inferior in degree to such as are presented by the words that convey the will of the Legislature, and therefore give way to that will. No mere regulation can defeat a statute. So far as in any reasonable way is practicable, effect is to be given to the very words of the act, but no method that is impracticable will be supposed to have been intended.

"I understand that no case has been presented to you in which it is not practicable, within the exigencies of

public business, and making use of the machinery of the custom house to identify the boundary line betwixt such leaf tobacco as is dutiable at 75 cents per pound and such as is dutiable at 35 cents. Disregarding, as I think we may, certain terms (viz., bale, &c.) introduced into the discussion apparently because at one period in the administration of the law these were very properly supposed to meet questions then arising upon certain cargoes, &c.—I say, *disregarding* such terms, I advise that there is no reason in the words of the statute why *bales* and *packages* may not be broken up in order to sort such different grades of leaf tobacco as may be contained therein."

I accede to the view taken by the Attorney-General, and hence hold that your action assessing a duty of 75 cents per pound, on the portion of the tobacco found in the package which belonged to the wrapper class, and of which 85 per cent. was suitable for wrappers, and which required more than one hundred leaves to weigh a pound, was correct.

You will conform your action to the ruling as herein made.

Very respectfully,
CHAS. J. FOLGER,
Secretary.

Collector of Customs, New York.

6674.

Leaf Tobacco—Classification for Duty.

TREASURY DEPARTMENT, December 10, 1884.

SIR:

The Department duly received your letter of the 22d ultimo, submitting the appeal (2263 k) of G. Cohn & Co. from your assessment of duty at the rate of 75 cents per pound on certain leaf tobacco imported into New York and Boston, and shipped thence to your port under the

immediate transportation act, and under an ordinary rewarehouse bond.

The whole importations were admittedly of the class known as wrapper tobacco, and some of the bales contained tobacco which possessed all the requisites necessary to subject it to duty at 75 cents a pound, under T. I., new, 246.

It is understood that the tobacco was in original bales, as shipped from the country of production, not having been opened, *en route*, and on re-examination by the appraiser at your port after his first examination, and at request of the parties, he reported that certain of the bales contained tobacco, which, although belonging to the wrapper class, was so heavy that it did not require 100 leaves to weigh a pound. The appraiser states that samples were drawn from each of the bales, which underwent the re-examination, in accordance with his usual practice in such cases, and that the classification of the whole bales was determined by such examination of samples.

If such rule of examination is sufficient generally, it should be applied to this case, and the extent of the examination required must necessarily be left to the judgment of the appraiser.

The question then arises whether the importation is to be regarded as an entirety so as to require 85 per cent. of the whole to have more than 100 leaves to the pound.

In Decision 6324, the question was discussed as to the unit to which the 85 per cent. related, and the rule therein laid down is that tobacco found in a package which belongs to the wrapper class, if found to have more than 100 leaves to the pound, is dutiable at 75 cents a pound. The contrary of this proposition is that where such tobacco is so heavy as not to require 100 leaves to weigh a pound, the whole bale is dutiable at 35 per cent. ad valorem. That rule was followed in some similar cases which arose at New York.

You will apply that rule in the present cases, and on amended return of the appraiser, in accordance therewith,

you will readjust the entries accordingly, and take the necessary steps to refund the excess of duties exacted.

Very respectfully,

H. F. FRENCH,
Assistant Secretary.

Collector of Customs, San Francisco, Cal.

7350.

Leaf Tobacco—How Classified.

TREASURY DEPARTMENT, February 3, 1886.

SIR:

Referring to Department's ruling of May 1, 1884 (Synopsis 6324), concerning the classification of leaf tobacco, it is understood that the present practice at your port is not in strict conformity with the rule therein laid down, which was advised by the United States Attorney-General, the classification of such tobacco being, in fact, made upon examination of average samples drawn from the bales containing the tobacco, by reason of which it is subjected to a duty of thirty-five cents per pound only, when in fact a large portion thereof in each bale consists of the "wrapper class," of which "eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound," which is dutiable at seventy-five cents per pound.

The rule laid down by such decision for ascertaining the proper classification of such leaf tobacco, which has lately been affirmed by the United States Circuit Court of New York, in the suit of Falk against Robertson, is that the different bales and packages which, as admitted by all parties, contain two different kinds or qualities of the wrapper class should be broken up, and each different quantity of each class separated for the purpose of classification, so that the portion consisting of the class above

mentioned should be subjected to a duty of seventy-five cents per pound, as prescribed by Schedule E (T. I., new, 246,) and the other portion, which does not come up to that standard, should be subjected to a duty of thirty-five cents per pound, under T. I. new, 247.

You are therefore directed to conform the practice at your port in the classification of such leaf tobacco to such ruling, and for that purpose you will require at least one bale in ten of every invoice to be thoroughly examined by the appraiser and if tobacco subject to the two different rates of duty be found therein, that the quantity of each be ascertained by an inspection if possible, or if not by inspection, then by an actual assorting of the "hands," and that the proportion of each sort so ascertained shall determine the proportionate parts of the whole invoice for the purpose of classification at the different rates of duty.

In case importers object to the opening and actual examination of such representative bales, the whole quantity should be assumed to contain wrapper leaf tobacco of the class paying the highest rate of duty.

Respectfully yours,

C. S. FAIRCHILD,
Assistant Secretary,

Collector of Customs, New York.

8299.

Examination and Classification of Leaf Tobacco.

TREASURY DEPARTMENT, June 20, 1887.

SIR:

The Department is in receipt of your letter of the 15th instant, reporting on the communication of Messrs. Haverenyer & Bigelius, concerning the practice now prevailing at your port with regard to the examination and classification of leaf tobacco of the wrapper class.

It appears from the report of the appraiser transmitted with your letter that the existing practice is based upon department's decision of February 3, 1886 (Synopsis 7350), which requires that leaf tobacco shall be thoroughly examined by the appraiser in order to determine the proper classification thereof under the tariff acts.

The appraiser reports that owing to a change in the character of certain leaf tobacco now imported whereby some of the contents of each bale is liable to a duty of 75 cents per pound while the remainder is dutiable at 35 cents per pound, the classification cannot be determined by an "inspection" of the bale, and that it would be almost destructive to the merchandise to determine the proportions of fine and heavy leaf contained therein by an actual assorting of the "hands" contained in the bale.

He suggests that a proper classification of such tobacco can be reached by drawing indiscriminately not less than ten "hands" or more if, in the judgment of the examiner, the same be necessary from each representative bale; separately counting and weighing these "hands" and taking the proportion of light and heavy "hands" so found for the purpose of determining the proportions for the whole bale or lot.

You state that in your judgment the law does not contemplate such an examination by the appraiser as will destroy, or even damage, imported merchandise, if avoidable, and that you commend the proposition of the appraiser to the favorable consideration of the department.

The department concurs with you in such views, and you are therefore authorized to adopt the proposition of the appraiser and to instruct that officer to carry it into practice in ascertaining the proper classification of imported leaf tobacco.

Respectfully yours,

I. H. MAYNARD,
Assistant Secretary.

Collector of Customs, New York.

8368.

Examination and Classification of Leaf Tobacco.

TREASURY DEPARTMENT, August 1, 1887.

SIR:

The Department duly received your letter of May 19th last transmitting the appeal (2533 *p*) of Mr. B. Weyl from your decision assessing duty at the rate of 75 cents per pound on certain leaf tobacco imported into your port from Paso del Norte, Mexico, March 1, 1887.

The samples accompanying your letter were forwarded to the Collector at Baltimore, with the appeal papers, with a request for his opinion, with particular reference to the question whether the requisite percentage of the tobacco represented by the sample is suitable for wrappers under T. I., new, 246.

The Collector at Baltimore returned the papers and samples, enclosing a report from the appraiser at that port from which it appears that from an examination of the samples 59 out of every 100 leaves are of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and that it requires more than 100 of such leaves to weigh a pound, and both the collector and appraiser at Baltimore were of the opinion that the invoice in question was properly dutiable only at 35 cents per pound.

The proper determination of the points involved will depend upon the construction which should be given to paragraph 246, especially with reference to the unit which should be adopted in ascertaining whether 85 per cent. of the commodity is of the weight and quality which will render it liable to a duty of 75 cents per pound.

The language of the paragraph would not seem to leave much room for doubt in this respect. The subject of the tax is "leaf tobacco," not "bales" or "hands" or "packages" of leaf tobacco, and the liability to duty cannot be made to depend upon the form of the package in which the importation is made.

Every leaf 85 per cent. of which is suitable for wrappers and the weight of which is such that more than 100 such leaves would be required to weigh a pound, is declared to be liable to the high rate of duty. This view is further strengthened by the provision in the paragraph that in determining the weight the individual leaves alone are to be regarded. The weight is not be determined by hands or packages or bales, but by leaves.

It is contended that in determining the percentage suitable for wrapper the government cannot include any more than that part of each leaf which is actually and finally used in the manufacture of a cigar, and hence it is further contended that if in working up the leaf 85 per cent. of it does not thus enter into the manufacture of the cigar as a finished product, then the tobacco is dutiable at the low rate. And as in no case 85 per cent. of any leaf is ever thus used, it would follow that the high rate of duty could never be imposed.

I do not think that such a construction can be sustained. The law has reference to leaf tobacco in the condition when imported and not to the final results, which may be obtained from its manufacture into cigars. It is dealing with a kind well known to the trade as suitable for wrappers—that is, fit to be set apart for use for such purpose—and if 85 per cent. of the leaf properly comes within that designation, and is of the requisite weight, the conditions of the law are met, and the high rate of duty should be imposed.

It has been suggested that it would be difficult, if not impracticable, for the appraiser to adopt a leaf as a unit, but it is not believed that such an objection rests upon tenable grounds.

Under the instructions already issued by the Treasury Department and now in force (see Synopses 7350 and 8299), it is the duty of the appraiser to ascertain and determine whether any given importation contains two different kinds or qualities of wrapper tobacco subject to different rates of duty, or whether wrapper leaf tobacco liable to the higher rate of duty is mixed with other leaf tobacco, and to

ascertain and determine the proportion of each, and assess duty accordingly. And the method adopted, as I understand it, is to take one or more bales, according as in the judgment of the appraiser it may be necessary, which would be regarded as representing the entire importation, and out of such bale or bales, to draw, at least, ten hands or packages which would be regarded as representing the bale, and then to examine each of these hands or packages and ascertain how many leaves in each are of the requisite quality for wrappers, and of such weight that more than one hundred would be required for a pound, and the proportion of such leaves so ascertained may properly be regarded as representing the quantity of such leaf tobacco in the entire importation. For instance, if the ten hands thus examined contained in all 400 leaves, and 200 of those leaves were of the requisite size, and of the necessary fineness of texture to be suitable for wrappers, and of such weight that more than 100 were required to weigh a pound, then one half of the entire invoice might be held to be dutiable at seventy-five cents per pound, and the remainder at thirty-five cents per pound.

If it is the practice to regard the hand or package as the unit, and in case eighty-five per cent. of it is not found to be of light weight and suitable for wrappers, then to regard the whole importation as dutiable at thirty-five cents per pound I think such practice is not in accordance with the intent of the law and should be discontinued.

The views here expressed are in accord with the opinion of the Attorney-General of April 23, 1884, in which he observes that the act is silent as to packages or bales, or any other merely commercial form in which the merchandise is imported, and declares that "wholly irrespective of such commercial form, the duty is levied directly upon the article rated by its qualities for certain sort of consumption—that is, into wrappers." And again he says: "Upon the face of the provision therefore, I submit that duty will attach to tobacco of the statutory description therein given, no matter what be the vehicle in which that tobacco is imported." And in conclusion he says: "I ad-

vise that there is no reason in the words of the statute why bales, packages, &c., may not be broken up in order to sort such different grades of leaf tobacco as may be contained therein."

It follows that in the case under consideration 59 per cent. of the invoice was dutiable at 75 cents per pound and 41 per cent. at 35 cents per pound, assuming that the samples presented fairly represented the different kinds or qualities of wrapper tobacco contained in the importation.

You are therefore authorized to reliquidate the entry accordingly, and to take the necessary steps for refunding any excess of duties.

While this appeal has been pending before the department application has been made on behalf of the importers of Sumatra leaf tobacco for a modification of the instructions heretofore given to the Collector at the Port of New York upon the subject, or that further and more explicit instructions be issued; and that a hearing has been had of all parties interested in the question, and the arguments presented upon both sides fully considered; and it is believed that the decision above rendered covers all the points involved in such application and the department declines to issue any other or further instructions upon the subject than what are contained in this decision and the decisions heretofore rendered upon the same subject which are *modified so far as they may be in conflict herewith.*

Respectfully yours,

I. H. MAYNARD,
Assistant Secretary.

Collector of Customs, El Paso, Tex.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

GUSTAV FALK AND ARNOLD FALK, plaintiffs in error,
vs.
WILLIAM H. ROBERTSON, LATE COLLECTOR of the Port of New York.
} No. 301.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

This is an action brought by the plaintiffs in error against William H. Robertson, late collector of the port of New York, to recover the sum of $3,294.15 with interest, which, it is claimed, the

defendant in error illegally exacted under the following circumstances:

Between January 14 and April 15, 1884, the plaintiffs in error made several importations of leaf tobacco from Holland, as fully appears by the bill of particulars filed with the petition.

The collector assessed a duty of 35 cents a pound on 3,154 pounds, part of the tobacco imported, amounting to $1,103.90, and 75 cents a pound on 14,487 pounds, the remainder, amounting to $10,866.75.

The duties were levied under the following provisions of Schedule F of the tariff of 1883 (22 Stat., 503):

> Leaf tobacco, of which 85 per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, $1 per pound.
>
> All other tobacco in leaf, unmanufactured and not stemmed, 35 cents per pound.

The tobacco in question was what is known in commerce as Sumatra tobacco and Havana tobacco, each of these kinds of tobacco deriving its name from the country in which it is raised.

It is a fact, about which there is no controversy, that when Sumatra tobacco leaves the

island where it is produced it is put up in bales weighing from 160 to 170 pounds, and composed *entirely* of the description of tobacco called *wrapper*, because of its general adaptation to making wrappers for cigars.

There is a fineness and softness and lightness in the Sumatra tobacco leaf which make it unequaled as a wrapper for cigars and give it a popularity among manufacturers which became alarming to the tobacco growers of this country. As an evidence of this, I give an extract from a statement made before the tariff commission by Mr. Oscar Hammerstein, of New York, at the time editor of the United States Tobacco Journal. This statement was read before the United States Senate, February 1, 1883, during the debate on the tariff under which the duties in question were levied (see 14, Cong. Rec., pt. 2, p. 1899).

I desire to engage the attention of the commission for a few moments while I speak upon a most important subject. The leaf-tobacco trade of the country has been brought to a standstill during the past six months, owing to the continually increasing importation of Sumatra tobacco. This tobacco first made its appearance in the United States about two years ago. It had never been used before, and it sprung into favor, first gradually, and then very rapidly, so much so that its importation has become enormously great, and the tobacco-culture industry of this country is threatened with almost entire destruction. I do not give you this merely as my opinion, but I

have the facts to prove it. The American tobacco trade is utterly at a stand-still, owing to this continued importation. The tobacco is imported in large quantities, because of its superiority to our home tobacco. The importation of this tobacco began to assume importance in July, 1880. At that time the importation amounted to about 12,000 pounds per month while during the month of July, 1882, it amounted to 147,224 pounds—a most enormous increase.

It might be well for me to state here that 4 pounds of Sumatra tobacco is considered equal to an average of about 12 pounds of home tobacco. If a manufacturer of cigars uses 4 pounds of Sumatra tobacco, he can cover 1,000 cigars with it as well as if he used 12 pounds of the tobacco raised in this country, in Pennsylvania, Connecticut, Ohio, and other States. The cost of Sumatra tobacco in the market averages from $1 to $1.20 per pound. Four pounds of Sumatra tobacco, at $1.20, makes $4.80. Twelve pounds of tobacco raised in this country, at 50 cents a pound, amounts to $6, so that, in point of fact, the tobacco raised in Sumatra is a great deal cheaper than the tobacco raised in this country. Besides that, it is equal to the finest Havana tobacco; indeed, it is a great deal better than Havana tobacco for wrapping purposes. A cigar wrapped with Sumatra tobacco, since it has become known, will bring ten times as high a price as a cigar wrapped with tobacco grown in this country.

It was in response to the loud and formidable demand made by the tobacco growers of Connecticut, Pennsylvania, Ohio, Massachusetts, Wisconsin, etc., for protection against this fine Sumatra tobacco which, as we have seen, was monopolizing the market, that the exorbitant duty of 75 cents a pound was laid on leaf tobacco, *of which* 85 per cent. was suitable in texture and weight for wrappers.

The Senate gave a great deal of attention to framing a provision that would accomplish the

end in view without, at the same time, exciting the displeasure of Holland by expressly discriminating against leaf tobacco from Sumatra, one of her dependencies.

But, if the position taken by the plaintiffs in error is correct, this provision, which was the result of so much reflection and debate, *amounts to nothing at all in the way of protecting the tobacco-growing interest*, and may be eluded with impunity; so that Sumatra tobacco may be introduced into this country, in any quantity, at the lower rate of 35 cents a pound, *which is precisely the duty that was paid on it under the old tariff!* (Rev. Stat., p. 469.)

It is claimed that this evasion or contempt of the law may be practiced successfully in the clumsy way used by the plaintiffs in error in this case. The record shows, and the fact is undenied, that after the bales of tobacco now in question arrived at Amsterdam they were opened and a sufficient quantity of inferior tobacco, called "fillers," introduced into the bales to make the proportion of the wrapper tobacco in each bale less than 85 per cent.

The inferior tobacco thus put into each bale was separated from the fine Sumatra tobacco by strips of paper or cloth, so that the one kind was readily distinguishable from the other.

It is not denied that every bale thus dealt with would have been dutiable at 75 cents a pound, *if it had been imported in its original condition, and when it was entirely homogeneous and represented a single classification only*, but it is claimed that the addition of enough inferior tobacco to reduce the proportion of fine wrapper tobacco below 85 per cent. makes the whole mass of each bale dutiable at only 35 cents.

This position, we think, is wholly untenable, because it ignores a perfectly well established classification of leaf tobacco, which Congress undoubtedly had in view, and which must be practically observed by dealers in it in order to make it marketable at all, or certainly to any advantage.

The classification thus ignored is that which distributes leaf tobacco into three classes, "*wrappers*," "*fillers*," and "*binders*."

"Wrappers" are leaves suitable for the outside finish of the cigar. "Fillers" are leaves that make up the body of the cigar, and "binders" are a secondary or inside wrapper, and, as their name would seem to indicate, hold together the loose material which constitutes the filling of the cigar, a purpose for which the fine wrapper tobacco would be insufficient. (R., pp. 12, 13, testimony of Arnold Falk, one of the plaintiffs in error, on cross-examination.)

It is necessary to assort leaf tobacco into these three classes to make it acceptable to the cigar manufacturer. Indeed, it can scarcely be called salable in any other way so far as the manufacturer is concerned.

On cross-examination the witness Falk was asked this question, namely: "The various grades of leaf tobacco, the binders, fillers, and wrappers, are and were at and prior to the date of this act *applied to different uses, and were bought and sold under different names, and were of different value in the market; is that so?* To this question he answered, "It is." (R., p. 13.)

The same witness was asked, on cross-examination, whether, generally, bales of leaf tobacco which at the date of the tariff act of 1883 were bought and sold in the trade in this country *were exclusively of one of these sorts.* His answer was, "*Most of the time.*" (R., p. 15.)

And when asked, "Was it customary, as bales of leaf tobacco were baled at and prior to March, 1883, to have, say, Sumatra and Havana tobacco in the same bale?" he answered, "No, sir."

It is obvious enough that an indiscriminate mixture of these several grades of leaf tobacco would render the confused mass unsalable, except at a sacrifice.

ARGUMENT.

The position of the plaintiff in error is that the *bale* is the unit or integer, and that if the contents of a bale show less than 85 per cent. of wrapper tobacco of the required texture and weight, then the whole mass of the bale is dutiable at 35 cents a pound only, even though the percentage of fine wrapper tobacco is reduced by adding to it inferior filler tobacco, for *the*

avowed and sole purpose of avoiding the high duty of 75 cents a pound.

It will be observed that, by the use of strips of paper or cloth, anything like a mixture of the good and bad tobacco is prevented. The wrapper and the filler tobacco remain entirely distinct. *The two kinds are associated for the mere purpose of evading the higher duty.* If there was produced a thorough confusion of both sorts of tobacco, it might be different, but here the association of the two kinds is, as we have said, a mere artifice for the purpose of getting the fine, high-grade tobacco into the country at the minimum duty of 35 cents. The mongrel package being once introduced, the association of its discordant elements becomes undesirable and prejudicial, since it is contrary to the usage of the trade to put fine tobacco on the market in the same package with low-grade tobacco.

The question, then, is whether Congress intended that the bale should be the unit and that if the percentage of fine wrapper tobacco in a bale should be reduced below 85 in the hundred,

no matter by what shift or contrivance, the *whole bale* should be dutiable at the lower rate.

It is but to look at the history of the provision of the tariff now in question, to be convinced that Congress did not intend to make the bale the unit to which the standard of the law was to be applied.

The present provision supplanted, as an amendment, the following provision of the tariff bill:

> Tobacco, in leaf, unmanufactured, when the greater portion *of the bale, box, or other package* is suitable for wrappers, 75 cents per pound upon the whole contents of such bale, box, or other package. (14 Cong. Rec., Pt. 3, p. 2564.)

It would seem quite clear that the adoption of the present provision in place of the one just quoted indicated a purpose to abandon the "bale, box, or other package" as a unit.

In connexion with the amendment it may be proper to quote the remarks of Senator Jones, of Florida, whose constituents were deeply interested in the subject, and who, therefore, may be presumed to have given it proper consideration. He said:

> I am satisfied with it. I realized when we were in committee how difficult it was to incorporate a provision into the bill which would exclude Sumatra tobacco without excluding Havana tobacco. I think this amendment will obviate that dif-

ficulty. While giving to our New England friends all the protection that they desire with respect to the tobacco they cultivate, it will at the same time permit the manufacturer of Havana cigars to import on reasonable terms the article which he requires in his business. That is the whole of it. (14 Cong. Rec., Pt. 3, pp. 2564).

It is evident from these remarks, and from the debate generally on this provision of the tariff, that it was a subject that received very careful treatment; and it would be remarkable if, after all the pains that were taken, nothing better, nothing more substantial was the result than an illusory provision that brings the law into contempt.

And although Senator Sherman thought importers would evade the law by mixing bad tobacco with the good, it does not seem to have occurred to him that this would be done with any tobacco but bad Sumatra. He did not suppose that the homogeneousness of the package would be destroyed.

While the citizen should not be held taxable on doubtful premises, it is equally clear that the tariff is to be construed with the liberality of a remedial law.

It remains to consider what is the unit or

integer to which Congress intended the percentage standard to be applied?

As there has been some diversity of opinion on this matter it is proper to put ourselves in the place of Congress and look at the subject-matter from the point of view from which they regarded it. This may be always done. In Platt *v.* Union Pacific Railroad Company (99 U. S., 64) the court says:

> But in endeavoring to ascertain what the Congress of 1862 intended we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and *discover its purpose from the language used in connection with the attending circumstances.*

See also Smythe *v.* Fisk (23 Wall., 380).

Considering the emphatic evidence that we have given that Congress intended to repudiate the bale, box, or package as the unit, the undoubted purpose to furnish protection to our own tobacco-growers against the ruinous competition of the Sumatra tobacco, the damage that would be done our tobacco-growers and the contempt into which the law would be brought if the evasion attempted by the plaintiffs in error should be countenanced, it seems impossible to hesitate in coming to the conclusion that Congress must

have had in view the known course of business in classifying certain leaf-tobacco as "*wrappers*," and must have intended to take the "*wrappers*" as the unit or integer in laying the higher duty, and that Congress did not intend that dealers should get the benefit of this classification as wrappers commercially, and then, by tying packages of "binders" or "fillers" to packages of "wrappers," *change the latter into a totally different grade of tobacco, for the purpose of evading the higher duty*, thus getting both the benefit of high prices and the minimum duty.

If the other side appeal to the commercial usage of shipping leaf-tobacco in bales, we, in our turn, appeal to the commercial usage of classing leaf-tobacco as "*wrappers*," "*fillers*," and "*binders*," and also to the commercial usage of shipping from Sumatra and of importing into this country Sumatra tobacco in bales containing nothing but "wrappers" (R., p. 23).

It seems entirely reasonable to conclude tha in laying the duty of 75 cents a pound Congress had in contemplation wrapper tobacco.

That is to say, Congress had in contemplation importations of packages of "wrappers" of which 85 per cent. was of the prescribed size, and fineness, and weight. In other words, it had, directly, in contemplation those homogeneous packages of Sumatra tobacco the active importing of which was giving so much uneasiness to the tobacco-growers in several of our States.

Read now in the light of the circumstances in which the law was passed, it really seems difficult to escape the conclusion that Congress was aiming at the classification called "wrappers."

It was not *leaf tobacco* that was to bear the high duty, but *leaf-tobacco wrappers*, which came up to the standard of the law.

Where the intention of the law is so clear it is presumed the court will see to it that that intention is carried out.

The learned counsel opposite first assumes that the bale is the unit, and then argues, on the authority of well known cases, that if the contents of the bale are so arranged that there shall not be 85 per cent. of wrapper tobacco coming up to

the standard, the higher duty can not be laid, and that the remedy is with Congress alone by enacting a more effective law.

Inasmuch as the law says nothing about bales or packages it is for the court to consider whether it will imply that it was the intention of Congress to adopt the bale as the unit or integer, and thus make feasible the entire frustration of the law, or whether it will infer from the use of the word *wrappers*, and the economic considerations that induced the legislation, and from the necessity of the thing that it was the purpose of Congress to adopt the class of wrapper tobacco as the unit, and to lay the high duty upon every importation of wrapper leaf tobacco that contained 85 per cent. of tobacco of the required size, texture, and weight, whether tied to any other sort of tobacco or not.

It is respectfully submitted that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

OCT 2[illegible]
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

October Term, 1890.

Gustav Falk and Arnold Falk, plaintiffs in error,
vs.
William H. Robertson, late collector, etc.
} No. 35.

SUPPLEMENTAL BRIEF.

Wm. A. Maury,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

GUSTAV FALK AND ARNOLD FALK, plaintiffs in error,
vs.
WILLIAM H. ROBERTSON, LATE collector, etc.
} No. 35.

SUPPLEMENTAL BRIEF.

The earnest contention made by the plaintiffs in error that it was the intention of Congress that the bale or package in which any wrapper tobacco is imported should be taken as the unit in determining the percentage of tobacco of the size and fineness suitable for wrappers and of which more than one hundred leaves are required to weigh a pound, renders it proper to look with a little more particularity to the evidence upon which the plaintiffs in error asked the court below to direct the jury to find a verdict for them.

The witnesses examined by the plaintiffs in support of the issue joined on their part were one of the plaintiffs, Arnold Falk, and George C. Hamlin, an examiner in the office of the appraiser at the port of New York.

Mr. Falk testified, on cross-examination, that leaf tobacco was classified and sold in the market as "*wrappers*," "*binders*," and "*fillers*" (p. 12), and when asked if "binders and fillers and wrappers are and were at and prior to the date of this act applied to different uses, and were bought and sold under different names, and were of different value in the market, is that so?" replied, "*It is*" (p. 13).

When asked, "Generally bales of leaf tobacco which, at the date of this act, were bought and sold in the trade in this country, were exclusively of one of these sorts?" (*i. e.*, wrappers, binders or fillers) answered, "*Most of the time*" (p. 15). The witness also said (pp. 15, 16) that it was usual for bales of leaf tobacco to be of one kind "according to the country of its origin," it being customary to designate tobacco as Sumatra or Havana or Java, etc., if grown there.

We give, in his own words, this witness's account of the way in which he put up his tobacco in order to evade the higher duty.

Q. Now, with reference to these particular importations of yours, tell me how the wrappers and fillers were packed together and how they came to be packed together?—A. Well, we put the original wrappers. We put this filler tobacco not suitable for wrappers. We put on top of this wrapper tobacco, which made an original bale.

Q. Do I understand you that the wrapper tobacco in these bales was Sumatra tobacco?—A. Yes, sir.

Q. And a bale of the Sumatra tobacco weighed about how much?—A. About 160 to 170 pounds.

Q. Then I understand that these bales that were imported, you took that bale and put some filler tobacco on top of it?—A. Put some filler tobacco, but we had to make it more than 15 per cent.

Q. I want to know what you did first before you give the reason. You put some filler tobacco on top of it?—A. Yes, sir.

Q. And you separated it from the Sumatra tobacco?—A. Put it on the Sumatra tobacco.

Q. Did you separate it by anything?—A. There may be strips of paper between them.

Q. You put strips of paper between the wrapper tobacco and the filler tobacco?—A. Between the wrapper tobacco and the filler tobacco.

Q. You took a whole bale of Sumatra tobacco and then you put some paper on it, and then put on top of that some filler tobacco, enough to be more than 15 per cent. of the whole quantity of both sorts?—A. Yes, sir.

Q. For practical purposes, was there any difficulty in separating the filler from the wrapper after you got the package here?—A. No; it wasn't much difficulty; no, sir.

Q. The difficulty would be the mere labor of moving it, not of distinguishing the kinds of tobacco or the kinds of tobacco one from another?—A. No, not at all.

Q. There would be no difficulty at all in doing that?—A. No, sir.

Q. As to any of these bales, did you, after receiving them from the custom-house, take off the filler tobacco and put it by itself and sell it by itself, and take the original bale of Sumatra tobacco by itself and sell it by itself?—A. Once in awhile we did; oh, yes.

Q. You did. There was no difficulty in doing that?—A. No, sir.

Q. What do you mean by once in a while?—A. We sell it complete; sell the entire package as it originally came in port; a good deal of it.

Q. Have you parted with all of it?—A. We sold it all; yes.

Q. And some of it you say, sold just as you received it from the custom-house?—A. Yes; sold it in bond, and some of it out of bond.

Q. You sold part of it while it was in the bonded warehouse?—A. Yes, sir. (Pp. 16, 17.)

* * * * * * *

Q. And the bales which you imported were bales as they came from Sumatra, except that while they were in Holland you there opened each bale, and in that bale you put more than 15 per cent. of the dutiable amount in fillers?—A. Yes, sir.

Q. And then you tied up the bale again?—A. Yes, sir.

Q. So that the outside bale as it came here was just as it originally came from Sumatra, but you had altered the contents of it by adding this?—A. Yes, sir. (Pp. 18, 19.)

In their letter to the Secretary of the Treasury, of October 25, 1883, the plaintiffs in error openly claim the right to evade duty by the artifice above described by one of them. In that letter they say:

* * * * * * *

We confess that this law was undoubtedly framed for the purpose of prohibiting the importation of Sumatra tobacco, which has been a very important feature in our trade with Holland for the past three years, *as this tobacco is the only leaf which can possibly come under the restrictions* the first referred to section of the new tariff imposes, IF PACKED IN THE MANNER CUSTOMARY PREVIOUS TO THE TAKING EFFECT OF SAID NEW TARIFF.

We have, consequently, *taken advantage of the exact reading of the law as it stands on record*, and have caused our tobacco to be originally packed to contain less than the limitation of 85 per cent. of wrappers in each package, and claim our distinct right to import at any and at all times during the existence of the present tariff such quantities of this tobacco as we may desire. (p. 21.)

The plaintiffs' witness, Hamlin, an examiner in the appraiser's office at New York, tells us

that the filler tobacco he found in the bales, and which was put there to reduce the percentage of the Sumatra tobacco, as we have seen, was "*very inferior*" (p. 30).

This evidence becomes extremely important, in view of the argument on the other side that Congress had in contemplation the bale as the unit on which the percentage should be calculated. For the question naturally suggests itself whether, if Congress had the bale in view, it was the *regular commercial bale*, containing *wrapper* tobacco, and *nothing else*, or the *made-up, fraudulent bale*, containing 17 per cent. of trashy tobacco introduced into the original bale on arrival at Amsterdam.

The law says nothing expressly about the bale or package, but if we are to imply that Congress intended the bale or package to be taken as the unit, it would seem reasonable and proper to imply that Congress had in contemplation the honest bale of Sumatra wrapper, well known to commerce, and not the dishonest made-up bale which was not then known to commerce at all, especially as the former view accords with the

purpose of the law, which, the plaintiffs themselves tell us, was to discourage the importation of Sumatra tobacco.

But why should it be implied that Congress intended to make the bale the unit? The duty is not laid on the *bale* of tobacco, but on the *pound* of tobacco.

Seeing how easily duty may be evaded by taking the bale as the unit, if the view advanced by the other side is sound, does it not appear more reasonable to conclude that Congress did not have the bale or package in contemplation, but intended that the unit should be the commercial grade of leaf tobacco called "*wrappers*?"

The several grades of leaf tobacco are never *mixed*, for mixture would be commercially destructive of the whole mass, and, consequently, we find in the plaintiffs' device for evading duty strips of paper carefully laid between the Sumatra wrappers and the fillers, so that there can be no obstacle whatever to adopting the grade of *wrappers* as the unit on which the percentage should be computed.

The simple question in the case then is whether

this Court will countenance the triumphant bravado of the plaintiffs, in their letter of October 25, 1883, to the Secretary of the Treasury, that their trick of tying trashy Havana filler tobacco to Sumatra wrappers is beyond the reach of the law.

If the court should hold that the plaintiffs must have their own way in this matter, the United States must refund a very large sum of money which has been exacted in other cases similar to the case at bar, upon the view of the law on which the collector assessed the duties in this case.

Looking at the words of the law alone, the meaning is unmistakable. The duty of 75 cents per pound is not laid, as supposed, upon "leaf tobacco" simply, but upon *leaf tobacco suitable for wrappers and coming up to the standard prescribed.*

The statute refers to a definite description of leaf tobacco. It has no reference to a heterogeneous mass of various descriptions of leaf tobacco, a thing unknown to commerce, *but to one description only.* If not, then what sense can be made of the next clause, imposing a duty of

35 cents per pound on "*all other tobacco in leaf*, unmanufactured and not stemmed?" Are we to do violence to the words by holding that they mean *all other packages or bales of leaf tobacco*, mixed or unmixed, regardless of the well known classification in the trade?

It is admitted by the plaintiffs that the primary object of Congress in laying the duty of 75 cents or $1 per pound was to prohibit the importation of Sumatra tobacco, and it is demonstrable, by the data on which Congress acted in laying this duty, that the Sumatra leaf for wrappers is the only tobacco known that comes up to the standard of fineness and lightness of the law. What, then, is to prevent the adoption of that sense which will accomplish the plain and admitted legislative intention?

The defect in the appeal made by the plaintiffs to various provisions of the revenue laws in support of the argument that the bale is the unit of quality and quantity in this case is that those provisions of law refer to bales or packages honestly made up with reference to the law, and not to bales or packages put up with direct reference to

avoiding duty. Bales or packages of that description, it will be found, are dealt with at the custom-house in a way directly calculated to protect the revenue, that being the main object in view.

The argument so strenuously made in favor of the bale as the unit on which the percentage of quantity is to be calculated seems to be fully met and overthrown in the following extract from the opinion of Attorney-General Brewster on the provision now in question. He says:

> The clause in question is as follows: "Leaf tobacco, of which eighty-five per centum is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound."
>
> I observe that nothing is said in the act as to *packages* or *bales*, or any other merely *commercial* form in which the merchandise is imported. Wholly irrespective of such commercial form, the duty is levied directly upon the article rated by its qualities for certain sort of consumption, *i. e.*, into *wrappers*. A like remark is true of each of the seven paragraphs imposing duty upon tobacco.
>
> Upon the face of the provision, therefore, I submit that the duty will attach to tobacco of the statutory description therein given, no matter what be the *vehicle* in which that tobacco is imported.
>
> I submit further that such questions as arise touching the best way of administering the above statute, however important they may be practically, are at least inferior in degree to such as are presented by the words that convey the will of the Legislature, and therefore give way to that will. No mere regulation can defeat a statute. So far as in any reasonable way is practicable, effect is to be given to the very words of the act, but no method that is impracticable will be supposed to have been intended.

I understand that no case has been presented to you in which it is not practicable, within the exigencies of public business and making use of the machinery of the custom-house, to identify the boundary line betwixt such leaf tobacco as is dutiable at 75 cents per pound and such as is dutiable at 35 cents. Disregarding, as I think we may, certain terms (viz, bale, etc.) introduced into the discussion apparently because at one period in the administration of the law these were very properly supposed to meet questions then arising upon certain cargoes, etc.—I say, *disregarding* such terms, I advise that there is no reason in the words of the statute why *bales* and *packages* may not be broken up in order to sort such different grades of leaf tobacco as may be contained therein.

Pursuing the same line of argument, the learned judge of the court below said, in granting a new trial in this case, after having instructed the jury to find for the plaintiffs:

A verdict was directed for the plaintiffs, upon the supposition that each bale, as a unit of quantity, however made up was to be estimated in determining the rate per cent. of quality.

Upon further consideration of the subject, on a motion for a new trial, it now seems that sufficient attention was not given to the composition of the bales. The quality and standard of the superior grade were not changed by binding the inferior grade in a separable manner with it into a bale. A distinct quantity of the superior quality, subject to the higher rate, was imported with each of the bales. It was the same where it came from, and all the way, and after its arrival. The act of Congress does not refer to any particular quantity as a basis for the 85 per cent. It appears to be intended to apply to any distinct quantity of the requisite qualities which should be imported. This is different from the case supposed in argument, of cloth made within one of the number of threads to the inch at which the rate of duty would be changed. There an article was made on which a certain rate of duty would be imposed, and the article would always remain the same. Here the article was sought to be reduced by association with another article during importation, and to be restored afterwards. But the association did not reduce nor affect it.

Unless it can be maintained that the tying of an inferior grade of leaf tobacco to fine Sumatra

wrapper tobacco so as to be separable from it, and for the mere purpose of reducing the percentage of the fine tobacco relatively to the whole mass, changes the character of the fine tobacco, we do not see the appositeness of the cases relied on by the plaintiffs, in which it is held that where duty is laid on an article of a certain form or color the manufacturer has a right to escape the tax by making the same thing in a form or color different from that described in the law laying the duty.

It is respectfully submitted that there seems to be good ground in the record for affirming the judgment.

WM. A. MAURY,
Assistant Attorney-General.